OUTLINES

OF

INDIAN LEGAL HISTORY

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FOREWORD

At the invitation of my esteemed friend and colleague, Mr. Mahabir Prashad Jain, I am writing this foreword deeming it both a duty and a privilege.

The need for a study of the history of one's legal system requires to be hardly emphasized. As in other fields of human activities so in law the roots of the present lie deeply buried in the past ; the present law cannot be adequately comprehended without a proper study of its origin and development. Such a study not only broadens the outlook of the student and explains the law as an organic growth but also accounts for the anomalies that existed in the law and do still exist here and there. For instance, why in our country the civil courts were prevented from taking cognizance of revenue cases ; why even the High Courts could not, in their original jurisdiction, entertain revenue cases till the coming into force of our new constitution ; why, as Mr. Jain describes, there were "artificial and invidious distinctions" (vide p. 355) between one High Court and another in respect of jurisdiction—all these can be understood only by a proper study of the history of the law and administration of justice since the British advent.

Unfortunately the study of Legal History is not insisted upon in most of our Universities. Only in Delhi and in Lucknow, so far as I am aware, is there provision for the teaching of Indian Legal History, and does Legal History form a part of the LL.B. curriculum. Even for the Master's Degree in Law Indian Legal History is, barring two or three Universities, neither a compulsory, nor an optional paper, though English Legal History is, in a number of Universities, an optional subject. Not every law student is a student of history, or is familiar with the historical method. If law is not to be studied merely as a body of *rules* laid down, from time to time, by certain authorities, (which is not the scientific way of studying the subject), if law is to be studied as an organic growth,—as an instrument for better social living,—then the history of the law must find a definite place in the legal curriculum.

It is sad that till recently in this country there has been a great dearth of literature on the subject. The monumental work of Kane—The History of the Dharmashastras—covers the very early Hindu period. There is no adequate book on the growth of law and the history of administration of justice from the end of the Smriti and Sutra period to the British advent. Cowell's book contains a brief survey of the history of the courts and legislatures since the British advent, and was for long very much out of date. The only other books worth mentioning are Rankin's Background, Morley's Administration of Justice in British India and Fawcett's First Century of British Justice, apart from Whitley Stokes' Introduction to the Anglo-Indian Codes. Each of these covers only a portion of the field. A student, especially for the LL.B. Degree, cannot be expected to read all these books, some of which are either out of print or not easily available, e.g., Morley's Administration of Justice in British India and Whitely Stokes' Introduction to the Anglo-Indian Codes. There was great need, therefore, of a good book on the subject of Indian Legal History, and the present book of Mr. Jain meets a long felt desideratum. He surveys the administration of justice and the growth of the law since the advent of the East India Company; he also traces, as Cowell, in greater detail the growth of administration of justice than the growth of the law itself. Perhaps he is right, because in early times the efficiency and the certainty of the *application* of rules of law were more important than the soundness of the *content* of the law—especially in the uncertain conditions then prevailing in India. Within a short compass Mr. Jain has given a good deal of information covering a wide field and ranging over three and a half centuries. He has made the subject, which is regarded as dry, very interesting in many places, and also useful. Interesting details are given of the trial of Nandkumar, the Patna Case and the Cossijurah Case. There is also a discussion as to whether the trial and conviction of Nandkumar was proper, besides an account of the racial discrimination that existed in the matter of administration of justice between the Indians and the British subjects. The value of the book is enhanced by the summaries that are

given, wherever necessary, following the survey over a convenient period of time; e.g., the summary that is given of the jurisdiction of the Supreme Courts (pp. 128 and 129). The more important work of the different Governor-Generals in the field of administration of justice is adequately surveyed and appraised, e.g., the judicial plans of Warren Hastings, Cornwallis, and Bentinck. Mr. Jain has also given an account of the development of the criminal law and a brief survey of the growth of the general law and of codification. As a teacher he has apportioned praise and blame with restraint and dignity, e.g., while discussing the merits of the British system (p. 324) and the contribution of the Privy Council to the growth of administration of justice and law in our country (pp. 384 and 385). He has also pointed out what, in his opinion, are the defects of the legal system as it continued to obtain. I wish he had added to the list of defects, the gross technicalities of the law, especially in the field of procedure, born of a foreign legal system, yet perpetuated in this country in close imitation, almost slavishly, even though in fairness it is to be admitted that many of the technicalities have disappeared, especially in the field of substantive law.

I have every hope that when Mr. Jain brings out another edition he would consider the desirability of incorporating a brief survey of the administration of justice as it obtained before the British advent, and also give a brief account of the development of the personal laws of the country.

Mr. Jain deserves the congratulations of scholars, and has placed the student community under a deep debt of gratitude. His work is a result of long, wide and careful study, and I am sure it will find a high place among the literature on the subject.

4th November, 1952
University of Delhi, Delhi

L. R. SIVASUBRAMANIAN

INTRODUCTION

The subject of Legal History comprises of the growth, evolution and development of the system for administration of justice. A sound judicial system needs to have two elements. In the first place, there should be a well-planned, well-regulated and well-ordered system of Courts following a simple, definite and scientific procedure. In the second place, there should be a system of law, expressed in simple words, definite and certain, easy of ascertainment and uniform as far as possible. Without a good system of law, the Courts, however thoughtfully they might have been planned, will administer justice depending on the whims, discretions, notions of good and bad, notions of justice and fairplay entertained by the presiding Judge—which in legal language we call justice, equity and good conscience. Since the notions and whims differ from man to man and time to time, justice without law would be haphazard, inconsistent, unprecise and indefinite. There would be chances of corruption and bribery. Again, a good stystem of law will fail to provide justice—impartial and even handed—if badly executed. Law and Courts are two wheels of the chariot of justice. Only good, laws, executed soundly and efficiently, will provide justice and impartial justice—which is of paramount importace to the progress, stability and well-being of the society. Legal History, therefore, deals with the development of Law and the Courts.

This truth was well realised by the English and they, therefore, tried to create a good judicial system in India. The Anglo-Indian period opens with a very elementary, or should we say, primitive judicial system. The British administrators came to have the responsibility of governing three tiny settlements in India. A judicial system was improvised. Non-legal, non-professional persons, namely, traders and merchants, were called upon to discharge the arduous task of administering justice both to the Natives and to the English. Theoretically bound to administer justice according to the English Law, these non-lawyer Judges discharged their job according to their whims, discretion, notion of fairplay and justice. The Judiciary

was neither separate from, nor independent of, the Executive which wielded all the powers and was thus supreme.

This state of affairs prevailed almost for nearly 150 years. The second phase of the Anglo-Indian Legal History starts with the Regulating Act and the creation of the Supreme Court of Judicature at Fort William. Being a Court of English Law, staffed by professional English Judges and aided by an English Bar, this Court came into India as an off-shoot, and with all the paraphernalia, of the Courts at the Westminister in England. Not only was it separate from the Executive, but it was independent of it and even of the Legislature. Although the new Court presented a welcome change in the policy, the Executive was very unhappy at its inauguration. Trouble between the two organs started immediately. It was only after 1781 that the two organs settled down side by side.

A third phase in the evolution of the Anglo-Indian judicial institutions starts in 1772 when the Company took upon itself the administration of justice in Bengal, and established Courts, or Adalats as they were known, with that purpose. The Adalat system in the later years underwent a series of changes. The names of Cornwallis, Bentinck and a host of others will always be remembered in that connection.

The fourth phase in the development is represented by the High Courts which began to be established in India after 1861. The High Courts are the precursor of the modern system of Law and Justice.

The evolution of the Privy Council as the ultimate Court of Appeal from India forms the fifth phase of the Indian Legal development. Along with the system of Courts, a system of law also developed in India. Conscious efforts in that respect started after 1833 due to the influence of Bentham in England. A process of codification of Indian Laws started. A number of Codes were enacted which laid down the foundation of the Anglo-Indian legal system.

The independence of India ushered in certain changes

in the system left behind by the English. The Privy Council gave way to the Supreme Court of Judicature as the ultimate Court of Appeal. The modern judicial system is essentially the same as bequeathed to us by the English. It is a great system and perhaps, the best legacy that the English have left behind.

The judicial system obtaining in the country at the present day is fairly sound and tolerably adequate. There is a mature, well established system of law, a major portion of which is codified. The country has achieved a solid basic unity in the legal field. On many fundamental branches of law, a uniformity of law prevails throughout the length and breadth of the country. The conspicuous examples are the Indian Contract Act, the Partnership Act, the Sale of Goods Act, the Transfer of Property Act, which apply throughout the whole country. But it must be admitted, that there is still much to be done in the fields of Hindu Law and Mohammedan Law which are badly in need of codification. The Hindu Code Bill was a timely step in the right direction.

A net work of Courts—arranged in tiers and grades—is spread throughout the country to administer law and justice. Liberal—perhaps, more than liberal—provisions exist for allowing appeals from the lower to the higher Courts. The Supreme Court of Judicature, the highest Court of land, exists to enforce the highest standards of justice and a common view of the legal issues and problems throughout the country. The all important independence of Judiciary has been adequately protected and reasonably safeguarded. Adequate precautions have been taken to enable the Courts to discharge their sacred though onerous trust fearlessly, impartially and effectively.

There are defects, too, in the Indian judicial system. A greater uniformity in the system of laws than achieved hitherto is both possible and desirable. The lower criminal Courts suffer from the great drawback of the union of Executive and Judiciary. The civil Courts are faced with an ever-growing volume of arrears of work. This has been the perennial problem for the Courts since the time of Cornwallis. Months, nay

years are often consumed before a suit is finally disposed of. The poor find themselves unable to defray the cost of litigation and so have often to forego their just claims and thus suffer injustice mutely and patiently. These are some of flinty questions which are constantly engaging the attention of the Indian legislators.

For a keen student of Indian Law and judicial institutions, a study of the Legal History is absolutely essential. The roots of the present lie buried deep in the past. The system of to day is the creation of neither one man nor one day. It represents the fruits of the cumulative endeavour, experience, thoughtful planning and patient labour of a multitude of administrators through the generations. To understand 'why it is so' one has to penetrate deep into the past and find out the factors, stresses and strains which have influenced the course of legal development in the past. To understand 'how it is so' one must appreciate the difficulties, the problems and the pitfalls which the administrators have to face in the past and the manner in which they dealt with them.

In the modern times, the historical method has been accepted on all hands to be the only proper way for studying human institutions; it is only through such a study that one can understand them in their true perspective. The same is true of the law, too. It cannot be properly understood when divorced from the history and the spirit of the nation whose law it is. Very early in the day, it has been said, 'A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.' (Counsel Pleydell in 'Guy Mannering').

The subject of Legal History is not merely of theoretical or academic interest. It is of importance not only to a jurist, legislator or an academician, but it has a great practical value also. A number of cases, contested in the High Courts and the highest Court of the land, have presented intricate problems which can be solved by going into the past and referring to

some aspects of the Indian Legal History. To name only one, Ryots of Garabandho v. Zamindar is a case in point.

It is rather unfortunate that, hitherto, not so much attention has been paid to the subject of the Indian Legal History as it so richly deserves. There is no dearth of material published or unpublished in this field and the apathy of the Indian scholars towards the subject has been perhaps due to a lack of proper appreciation of its relative importance and value in the scheme of things.

Recently, however, a few Universities have incorporated the subject in their curriculum for LL.B. and LL.M. It may be hoped that, with the passage of time, more Universities will follow suit in this respect.

It was in the year 1945 that the University of Delhi introduced Legal History of India in their LL.B. curriculum. For a number of years I have had the privilege of associating myself with the teaching of the subject to the LL.B. and LL.M. classes. One genuine difficulty that the students have very keenly felt is of the absence of a proper text book on the subject. There are a number of old publications but they are now not easily available. Moreover, there is no work which in a reasonable compass seeks to give a short co-ordinated, integrated and a coherent account of the important phases of the development of legal institutions in India. It is to meet this want, that I have ventured to execute this work. Promotion of its study being a desideratum, an introductory work dealing with the outlines of the Indian Legal History became absolutely essential.

I make no claim for having embodied in this book the fruits of any original research. Its material has been collected from a large number of old works, which are available to-day only in Government Archives. For some portions, I have gone through the original material to be found in the Records of the various Governments. There is a mass of variegated material for the history of the Indian Legal Institutions which,

I fondly hope, it may be possible for me at some future date, to collect and present as an ordered whole.

In the execution of this work, I have received substantial help from many quarters, mainly from my students. I am deeply indebted to them and in particular to Mr. S. N. Jain, M.A., Mr. Anand Agrawal, LL.B., Mrs. Shanti Gupta LL.B., for their having helped me in a number of ways. I am thankful to my colleagues in the Faculty of Law of the Delhi University for kind encouragement that I always received from them. My thanks are also due to Prof. L.R. Shivasubramanian, LL.M., Dean, Faculty of Law, Delhi University, without whose kind patronage it would not have been possible for me to execute the work. Mr. S. Das Gupta, Librarian, Delhi University, helped me greatly by procuring some rare books and I am deeply indebted to him for the same. Last but not the least, I am thankful to Mr. M. M. K. Seth of the University Press for the efficient way in which he handled the job. He was kind enough to make many valuable suggestions which, I am sure, have added to the utility of this book.

1st October, 1952,
Yale Law School,
U. S. A.

M. P. JAIN.

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CHAPTER I

THE ENGLISH AT SURAT

EAST INDIA COMPANY, THE CHARTER OF 1600

The emergence of the British Empire in India stands out as an event of unique interest in the history of the World. Unlike many other empires, the magnificent edifice of the British Kingdom in India was the creation of merely a company—a corporation—which was originally conceived purely for furthering the British commercial interests in the over-seas countries.

This Company was commonly known as the East India Company. It was incorporated in England on the last day of December, 1600, by a Charter of Queen Elizabeth. The full official title of the Company was "The Governor and Company of merchants of England trading into the East Indies." This Charter settled the constitution, powers and privileges which were to be enjoyed by the Company.

The Company was to have a life of fifteen years in the first instance. But the Charter could be revoked earlier by the Crown on two years' notice if the trade carried on by the Company did not appear to be profitable to the realm.

During this period of fifteen years, the Company was to carry on trade into and from the countries lying beyond the Cape of Goodhope eastward to the streights of Magellan. These geographical limits incorporated many important countries like India, America and Africa etc. The right of the Company to carry on trade within this area was to be exclusive. No other British subject could carry on trade within this sphere. Unauthorised traders were to be liable to forfeiture of their goods, ships and tackle and to imprisonment or such other punishment as might appear to be '*meet and convenient*'.

The affairs of the Company were to be controlled and conducted on democratic principles. All the members of the

Company were to form, what was known as, a General Court. This General Court was to elect every year a Governor and twenty-four Committees or Directors. These persons were to form the Court of Directors and were to manage the business of the Company. The tenure of Office of all these persons was ordinarily to be one year. But any one of them could be removed earlier by the General Court if it was found that he did not *"demean himself well in his said office."* Any vacancy caused by such removal, was to be filled by the General Court for the remaining part of the year.

POWER TO MAKE LAWS

The Charter conferred on the Company certain limited powers of legislation also. The Company was authorised, in its General Court, to make, ordain and constitute laws, orders and constitutions etc. These laws were to be reasonable and were not to be contrary or repugnant to the laws, statutes or customs of the realm of England. The Company could make laws for the good government of itself, for all its various categories of servants and officers, and also for the better advancement and continuance of its trade and traffic. For due observance of these laws, the Company could impose pains, punishments and penalties, by way of imprisonment of body, fines and amerciaments. It was laid down that these *penalties and punishments must be reasonable and should not be contrary or repugnant to the laws, statutes and customs of the English Kingdom.*

The legislative power, thus granted to the Company, was very limited. It was a power only of minor legislation. The condition that the laws enacted by the Company should not be contrary to those of England shows, that the idea was that there should not be any fundamental deviation or departure from the principles of English Law. It will be noticed that there is no reference to any factories or territories in this grant of legislative power. This shows that in the beginning the aims of the Company were essentially commercial. It was never thought that the Company would acquire territories in any foreign country and become a political power. This

explains the absence of any authority in the Company to legislate for the governance of its territorial acquisitions.

Further, the power to make laws was limited drastically by the nature of punishments which could be inflicted for their breach and contravention. The punishments could only be fine and imprisonment. No other punishment could be prescribed by the Company. No law prescribing capital punishment could be enacted by the Company. This power to make laws was on the same lines as the power usually conferred in those days on ordinary municipal and commercial corporations. The idea was that the Company might be able to make regulations for keeping discipline among its servants and also make rules and ordinances for the conduct of its own business. The legislative power was not at all sufficient for enabling the Company to carry on the government of any territory.

However, in spite of its limited nature, this legislative power is of great historical importance, for it was out of this provision that the later powers of the Company developed.

CHARTER OF 1609

On May 31st, 1609 the Charter of the Company was renewed by James I. The trade and commerce of the Company had been found to be beneficial and profitable to the English nation and, therefore, to encourage and advance the Company, King James I issued this fresh Charter. The important feature of this Charter was the absence of any limit on the continuance of the Company. It was placed on a perpetual basis subject, however, to the right of the Crown to determine it on three years' notice on proof of injury to the public. All the other privileges, powers and rights which had been granted in 1600 to the Company by Queen Elizabeth were continued without any modifications.

THE ENGLISH FACTORY AT SURAT

Armed with these sundry powers, the Company started on its career of trade and commerce. Its representatives set their feet on the Indian soil during the reign of Jahangir. The

first requisite for properly organising and conducting commercial activities in India was to find out a suitable place where the Company could locate its business centre. Surat was selected for this purpose.

Surat at this time was an important commercial centre and a populous town within the Mughal Dominions. It already enjoyed the status of an international port because it was from here that the pilgrims to the holy land of Mekka and Madina started on their voyage every year. The chief merit of Surat from the English point of view, however, was its port.

It was not without much difficulty that the English could establish themselves at Surat. The Portuguese were already settled there and they could not be expected to tolerate competitors establishing themselves. A contest between the two took place; the Portuguese naval power was routed, and in this way, in 1612, the English were successful in establishing their first factory on the Indian soil. To start with, the English entered into an agreement with the local Mughal Governor. But after some time they felt that to lend permanency to their establishment at Surat, they must contact the Mughal Emperor and secure facilities directly from him. With this purpose in view, James I despatched an ambassador, Sir Thomas Roe. He reached the Mughal Court at Agra in 1615 and succeeded in securing certain facilities for the English. The important ones were :—

1. That the English were to be allowed to live according to their own religion and laws without interference.

2. Disputes among them were to be regulated by their own tribunals.

3. Disputes between an Englishman on one hand, and any Hindu or Muslim on the other, were to be settled by the established local native authorities.

4. In all cases of complaints and controversies the Mughal Governor or Kazi of the place was required to do Justice to the English and protect them from all injuries or

oppressions whatsoever. He was directed to *'aid and entreat them as from with courtesy and honour.'*

RIGHT OF SELF-GOVERNMENT FOR THE ENGLISH

The important thing, therefore, that Roe was successful in securing from the Mughal Emperor was *the right of self-government for the English.* They were to be allowed to trade freely. They were allowed to establish a factory at Surat; they were also to have the privilege of regulating their affairs and relations *inter se* according to their own laws, and to this extent, they were to be exempt from the local jurisdictions.

SURAT—ITS ADMINISTRATION

The factory at the time was merely a trading station where the Company had its warehouses, offices and residential quarters for its officers. The main business of the Company was that of import and export and for all this they required spacious godowns and warehouses which were located within the factory area.

For some time to come the English Factory at Surat was the chief centre of the Company's activities in India. It was the first *presidency,* being known as such due to the fact that its administration was conducted by a President or Governor and Council. The President and every member of the Council were appointed by the Company. According to the practice, all the affairs of the factory were regulated by a *majority vote* in the Council. The President did not have any veto power by which he could over-rule his colleagues in the Council. He merely had one vote; all the important questions were put before the Council, discussed and decided according to the majority opinion. This system was very much different from the one that subsequently developed and worked in India under which a Governor had a veto power by which he could over-rule even the majority opinion in the Council. In the beginning, the Governor did not enjoy such a wide power; he was only one among the Council members.

COMPANY'S SERVANTS

The servants of the Company were divided into three classes. The juniormost were known as 'Writers'. They had to serve as such for five years on a small salary of £10 per year. After that period the servants became 'Factors' and their salary increased to £20 per year. After three years more they came to be known as 'Senior Factors'. Lastly, after the lapse of three more years, they became 'Merchants' and received a salary of £40 per year. It was out of this last category that the important offices like the membership of the Council, Chiefs of subordinate factories etc. were filled.

All the servants of the Company lived together in the factory, had a common mess and led more or less a collegiate life. The expenses for their boarding and lodging were met by the Company. One would be surprised at the awkwardly low salaries that were given to the servants of the Company. To make up this deficiency, these servants had a right to conduct their own private trade on land. It was this right that served as an attraction to the young Englishmen to leave their homes and come over to India at such low salaries. Service in the Company provided them with opportunities for their own private trade and they could make enough money on that account.

LAW AND JUSTICE

The Englishmen at Surat were under a *two sided law.* It has already been pointed out that as a result of the efforts of Sir Roe, the Mughal Emperor had granted a right of self government to the English. It means that for the affairs arising among the Englishmen themselves, they were to be governed by the English Law. Their affairs were to be regulated by their own tribunals and authorities within the factory. But regarding those causes and transactions, in which one of the parties happened to be an Indian, the Mughal had directed that they should be decided by the established native tribunals in the land. The English had settled in Surat with the leave of the Mughal Government. Ordinarily, therefore, they would

have been subject to the laws of the country. In these circumstances the right of self government granted to the English was a great relief to them. The difference between the local laws, whether Hindu or Mohammedan, and the English Law was inevitably such as to render it natural for the English to desire, that the disputes between them, *inter se*, might be decided by themselves according to their own rules and customs. The Hindu and Mohammedan Laws are religious in origin and character. The English merchants did not cherish the idea of being governed by any of them. The Mughal, who was hardly interested in interfering with their internal affairs and bringing them under the Indian laws in such matters, obliged the English by acceding to their request for self-government. The English could, without any injury to the State, be allowed to govern themselves according to their own laws, and so they were permitted to do so.

DOUBLE SIDED LAW

But no ruler could divest himself of his responsibility for the welfare of his subjects. No ruler could be expected to tolerate unruly conduct towards his subjects or allow injuries to be inflicted on them. It was, therefore, insisted that cases arising among the Englishmen and the Indians must be decided by the established tribunals of the land.

The English at this time thus lived under a two sided law. For some cases the English Law, and for others the Indian Law, operated on them.

PRESIDENT AND COUNCIL AS COURT

In Surat, no regular tribunals were started for deciding causes arising among the Englishmen themselves. The President and Council of the factory had authority to administer justice in criminal cases. This authority was conferred on them under the commission of the English Crown.

On February 4th, 1623, the English King James I empowered the East India Company to issue commissions to any of their Presidents and his Council to "chastise, correct and

punish all and every the subject of us, our heirs and successors employed by the Company." It was under this authority that the President and Council of the Surat factory administered criminal justice and inflicted suitable penalties on the offenders. The death sentence could also be inflicted under this commission but subject to two safeguards. Firstly, it could be inflicted only in case of mutiny or other felony. Secondly, it could be inflicted only after a trial with the help of a Jury of twelve or more Englishmen.

The President and Council also decided cases of a civil nature and administered justice in this sphere too. Thus the executive wielded the whole of the judicial power at this early stage.

In all these cases, English Law was supposed to be administered. But the President and the members of the Council, on whom lay the responsibility of administering law and justice, were not lawyers. They were merely traders, and so they were not expected to have any knowledge of the technical rules of the English Law. The result, therefore, was that they decided cases not according to the principles of English Law but merely according to their own sense of justice and fair-play.

CASES BETWEEN AN ENGLISHMAN AND AN INDIAN

The native tribunals established at Surat constituted the proper forum to take cognisance of the cases between an Englishman and Indian. But the Mughal judicial tribunals at this time were not such as to inspire a sense of respect for law and justice. The administration of justice at the time suffered from many evils and vices. Corruption and bribery were very common. The state of judicial administration was very unsatisfactory. The result, therefore, was that the Englishmen often took law into their own hands. Instead of their taking recourse to the Native tribunals, they would try to extract justice from the Indians by themselves whenever they could do so without any apprehension of Mughal reprisals.

SURAT CEASES TO BE A PRESIDENCY

The factory of Surat was not destined to enjoy for long the pre-eminent position of being the Company's principal trading station in India. The Company found the island of Bombay to be more convenient for its purposes. In May, 1687, the seat of the President and Council was transferred from Surat to Bombay. Surat then began to lose all its importance and Bombay became the principal centre of the Company's activities in the western part of India.

CHAPTER II

ADMINISTRATION OF JUSTICE IN MADRAS[1].

INTRODUCTORY

The Judicial institutions in the town of Madras before 1726, developed in three stages. The first stage began with the foundation of Madras in 1639 and continued up to 1666. During this period, the state of administration of justice was very primitive and elementary.

The second stage began with the year 1666 and continued up to 1686. This period witnessed the emergence of a regular Court consisting of the Governor and Council. This Court administered justice in civil as well as criminal cases to all the inhabitants of the settlement.

The third stage started from 1686 and continued up to 1726. The significant event in this period was the creation of two Courts, the Mayor's Court and the Court of Admiralty.

FIRST PERIOD (1639-1666) : FOUNDATION OF MADRAS

Madras was founded in 1639 by one Francis Day who succeeded in acquiring a piece of land from a Hindu ruling chief of the Peninsula. On this piece of land, the Company constructed a fortified factory. The fort was named as the Fort St. George.

The Raja also granted certain privileges to the Company along with the grant of the piece of land. The Company was empowered to mint money and to govern Madraspatnam, which at the time was a small village existing near the Com-

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1 A distinction has to be made between the Town of Madras and the Province of Madras. The former was the seat of Government and had grown directly as a result of the establishment of an English Factory. The discussion here is confined to the Town of Madras. Initially the activities of the English were confined merely to the Town. But later on, when the English embarked on a programme of political expansion, they acquired territory round about the settlement of Madras. It was placed under the control of the President and Council at Madras. Then only the province of Madras was formed.

pany's Fort. In course of time this village grew. Many persons were attracted to this place on account of the facilities of trade and commerce that it offered. The village came to be known as the Black Town as it was inhabited by the Indians.

Inside the Fort resided the Europeans and the British servants of the Company and this settlement came to be known as the White Town. The whole establishment comprising of the White and Black Towns later came to be known as Madras.

ADMINISTRATION OF MADRAS

To start with, Madras was merely an agency. Its administrative head was known as an Agent. He, along with a small Council, regulated all the matters and affairs of the Factory. At the time these affairs related mainly to the commercial activities of the English and did not present any complicated administrative problem. As time passed on, however, political and administrative activities were also added to these commercial affairs.

Madras was placed under the Surat Factory which was the chief Factory and the only Presidency in India at the time. It was only in 1666 that Madras itself secured the status of a Presidency.

The problem which the British administrators faced at Madras in the sphere of law and Justice was very much different in nature from the one existing at Surat. Surat was an important town within the Mughal dominions. There were, therefore, already established tribunals for the administration of justice to the Indians. The English had to take care only of their own cases i.e. cases among the Englishmen *inter se*. They were under no obligation to provide for the administration of justice to the Indians. On the other hand, the settlement of Madras had developed out of a very small village. It was created practically from a scratch. Besides the English, a large number of Indians also came to reside there. The responsibility to administer the place lay on the English. The Raja had already conferred this privilege on the Company. The

Company was, therefore, under an obligation to create tribunals for the administration of justice, not only to the Englishmen, but also to the Indians residing there.

JUSTICE IN THE WHITE TOWN

Not much information is available regarding the system of administration of Justice in Madras during this period. In the White Town, the Agent and the Council decided all cases, civil and criminal. Their judicial powers, however, were very *vague and indefinite.* They formed a very inefficient and a hesitating sort of a Court. Very often they referred causes to England and took counsel with the authorities of the Company there.

ADMINISTRATION OF JUSTICE IN THE BLACK TOWN

The English did not start any regular judicial tribunal in the Black Town during this period. As noted above, the Raja, along with the grant of the piece of land for erecting a fortified Factory, had also conferred on the Company, powers of administration for the nearby village of Madraspatnam, which later grew into the Black Town. The Company could have established courts there under this grant of the Raja. But they did not do anything like that and left the old, traditional, indigenous village system intact.

From very early times, there functioned a Choultry Court in the village of Madraspatnam. This was on the usual pattern of village administration in those days. The village headman, known as Adigar, used to sit in the Choultry Court and decide petty civil cases and small breaches of peace. The Choultry Court also served as the Custom House and Registration House of sales of immovable property. This Court continued to function even when the village of Madraspatnam had become transformed into the 'Black Town'.

No other tribunal, except the primitive Choultry Court, functioned in the Black Town during this early period. Nothing is known about the method of trial and procedure in serious criminal cases like murder etc., which, as pointed out, the

Choultry Court was incompetent to handle. There is, however, on the record an account of a case which occurred in 1642. An Indian was accused of having murdered a Native woman. Some sort of a trial took place and he was found guilty of the offence. The Agent communicated these findings to the Raja who ordered that *justice be done in accordance with the laws of England*. Thereupon the man was hanged. This shows that in serious criminal cases reference was made to the Raja and punishment executed thereafter.

The first period is conspicuous by the absence of a regular Judicature to administer justice on a systematic basis. The information available is very meagre. The one peculiar feature of this period appears to be the existence on the settlement of two separate and distinct bodies to administer justice, the Agent and Council for the White Town and the Choultry Court for the Black Town. The Agent and Council did not administer justice to the Indians in the Black Town. They were left more or less to their own customary methods.

THE CHARTER OF 1661

The Charter of 1661 is an important landmark in the history of the evolution of judiciary in India. This Charter was granted by Charles II on April 3, 1661. It granted new and important privileges to the Company. The Charter was responsible for improving considerably the administration of justice in the settlement of Madras.

Firstly, the Charter authorised the Company to appoint Governors and Councils in their settlements in India. Secondly, a general judicial authority was conferred on the Governor and Council of each factory *to judge all persons belonging to the Company or living under them, in all causes civil and criminal according to the laws of England and to execute judgment accordingly*.

This extended grant of power to the Governor and Council in each English settlement in India was a great improvement over the previous position. The power of the Governor and Council, which was restricted formerly to the

servants and officers of the Company only, now became extended to those persons also, who happened *to live in the settlement* but *were not the servants of the Company.* This meant that the Indian residents of these settlements were now put under judicial power of the respective Governor and Council.

The Charter of 1600 had prescribed that the Company could impose punishments only by way of imprisonment or fine. But, under the new Charter there was no such restriction on the nature of punishment. All cases, civil and criminal, fell within the jurisdiction of the Governor and Council and they became entitled to award even the capital sentences in suitable cases. Thus their judicial power under the Charter of 1661 was more extensive than that ever enjoyed by them previously.

Two features of this Charter may, however, be emphasised. In the first place, the judicial power was granted to the Governor and Council of each factory, which meant the executive Government of the place. Therefore, there was no separation between the executive and judiciary at this early period. In the second place, the Governor and Council were required to administer justice in accordance with the Laws in force in England. This was a safe-guard provided to the Englishmen. The right of the Englishmen to be governed in accordance with the English Law, was always protected very tenaciously and, therefore, the Governor and Council were required to judge them in accordance with the English Law. But this provision which conferred a privilege on the Englishmen, worked to the distinct disadvantage of the Indians, because it required the Governor and Council to judge them also according to the English Law. In this scheme, there existed no provision for preserving and applying to the Indians their own peculiar usages, customs and Laws.

AGENT BECOMES PRESIDENT

The Charter of 1661 did not effect any immediate change in the system of administration of justice in Madras. Things continued as they were. In 1665, there occurred an important case which proved to be the turning point in the history of

legal establishments in the settlement. One Mrs. Ascentia Dawes was accused of having committed murder of her slave girl. The case came for trial before the Agent and Council. As usual, the Agent and Council referred the case to the authorities in London for their advice. The Company, after much consideration, resolved that the *Agency at Madras should be raised into a Presidency*, so that the President along with his Council might exercise judicial powers under the Charter of 1661, which had conferred large judicial powers on the Governor and Council and not on the Agent and Council. As a result of this case the Agency at Madras became the Presidency of Madras in 1665. The administrative head of the place was designated as the President or the Governor.

Soon after, the President and Council at Madras conducted the trial of Mrs. Ascentia Dawes. The trial was held with the help of a Jury. After the trial, the Jury declared Mrs. Ascentia Dawes[1] as not guilty, and so she was acquitted. This particular trial is interesting in so far as the Governor and members of the Council, none of whom was a lawyer by education or training, found it difficult to meet the several legal complications that arose in it. In a letter to the Company they said that they found themselves at a loss in several things for want of instructions, having no man understanding the *Law and formalities of Law to advise them.* They also pointed out that if in future any similar case occurred, they needed the direction and assistance of a person better skilled in the Laws and their formalities than any of the Company's servants at the time at Madras was conversant[2].

Nothing, however, was done to provide these lay judges with the assistance of a lawyer and they continued to administer justice according to their own wisdom and common sense.

This marks the end of the first period of the growth of judicial institutions in Madras. The Governor and Council

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1. Love, *vestiges of Madras*, I, 404, 405.
2. Love's.....I.....405

composed a Court which had wide judicial authority over all, Englishmen and Indians, under the Charter of 1661.

SECOND PERIOD : REORGANISATION OF THE JUDICIAL SYSTEM

The second period in the development of judicial institutions started with 1678, when Streynsham Master became the Governor of Madras. He was responsible for re-organising the whole system and putting life and vigour into it.

The Court of the Governor and Council which came into existence in 1666 was not functioning very earnestly or regularly. Streynsham Master infused life into this Court. In 1678 the Council resolved that the *Court of the Governor and Council should sit more regularly.* It was declared that the Court *would administer justice in all causes civil and criminal according to the Laws of England;* that the Court would sit on two days in a week and that all trials in the said Court would be by *jury of* 12 *men.* This Court was designated as the High Court of Judicature.

CHOULTRY COURT RE-ORGANISED

Besides this, a lower Court, which could hear and try petty cases, was also started. This Court was nothing else but the old Choultry Court, with which we have already established acquaintance in the first period.

This Choultry Court was re-organised and put on a new basis. Formerly an Indian Officer had sat there to dispense justice. He now gave way to the English servants of the Company. Three officers, mint master, paymaster and the customs master, were assigned the additional function of sitting at the Choultry Court on two days in the week. They were authorised to decide all cases up to a value of 50 pagodas[1]. The Choultry Court was also to decide petty criminal cases.

Appeals from this Court lay to the Court of the Governor and Council known as the High Court. The High Court was not to entertain directly the cases cognizable by the Choul-

1. A Gold Coin worth three rupees.

try Court, but only in appeal, after the latter Court had given its verdict.

During this period a hierarchy of Courts thus came into existence in Madras. Two Courts, a superior Court of judicature and a lower Court, were established. Their respective jurisdictions were demarcated. The lower Court could take cognisance of cases up to Rs. 150/-, and small offences. All the other cases, and appeals from the lower Court, were to be heard by the upper Court with the help of a Jury.

THIRD PERIOD : THE CHARTER OF 1683

This period started with the inauguration of an Admiralty Court in Madras.

The Company had a monopoly of trade in this part of the World granted to it by the Charter of 1600. But many English merchants constantly indulged in unauthorised traffic against the tenor of this grant and thus caused loss and injury to the Company. To deal with this breach of its privileges, the Company wanted some more judicial powers. Moreover, the crime of piracy had also become very common. These crimes were committed, not on land but on the High-Seas, and, therefore, there was a great necessity of a Court which could deal with such cases. With this idea, the English Crown granted a Charter to the Company in 1683, which made important provisions regarding the judicial arrangements of the Company in its settlements.

This Charter *authorised the Company to establish* one or more *Courts* at such place or places as it wanted.

Each Court was to consist of *one person learned in the Civil Law* and two merchants to be appointed by the Company.

The Court was to have power to hear and determine all cases, *mercantile or maritime* in nature, concerning persons within the Charter limits of the Company. It was authorised to deal with all cases of *trespasses, injuries* and *wrongs* done or

committed on the *High-Seas* or within the Charter limits. The Court was also authorised to determine cases of *forfeitures and seizures of ships* or goods which came for the purposes of trading within the Company's monopoly area against the Charter granted to it by the English Crown in 1600.

The Court was directed to decide these cases according to the rules of '*equity and good conscience*' and '*the laws and customs of merchants.*' The Court was authorised to settle its own procedure.

ADMIRALTY COURT CREATED

Under this Charter, a Court of Admiralty was started in Madras in 1686. In 1687, this Court secured from England the services of a professional lawyer, Sir John Biggs, who was to sit here as a person '*learned in the Civil Law*', as required by this Charter. With the establishment of this Court the President and Council ceased to exercise judicial functions. The Court hitherto composed of them was superseded by the Court of Admiralty. The Admiralty Court did not confine itself only to hearing Admiralty cases proper as conceived by the Charter of 1683, but it exercised a much wider jurisdiction. The Government at Madras allowed it to act as the General Court of the town dispensing justice in all ordinary civil and criminal cases. The Court decided criminal cases with the help of a jury.

THE MAYOR'S COURT

A year later Madras witnessed another important event in the creation of an additional Court, known as the Mayor's Court. This Court was started under a Charter issued in 1687. The peculiar feature of this Charter was that it emanated not from the Crown but from the Company itself under its various powers that had been granted to it by the earlier Charters of the English Crown.

The Mayor's Court was a part of a much wider entity, the 'Corporation of Madras' which was instituted in 1688 under the above mentioned Charter of the Company. This Cor-

poration was to consist of a Mayor, twelve Aldermen and sixty or more Burgesses. Every year the Aldermen were to elect their Mayor. The first twelve Aldermen as also the first Mayor were appointed by the Charter itself. They were to hold office for life or residence in Madras. Any vacancy among the Aldermen was to be filled by them by election from amongst the Burgesses.

The number of Burgesses was to be between 60 to 120, and were to be selected by the Mayor and Aldermen.

The Mayor was always to be an Englishman. Out of the twelve Aldermen three were to be the covenanted English servants of the Company. The remaining nine Aldermen could belong to any nationality.

The Mayor and Aldermen were constituted into a Court of Record for the town. The Court, known as the Mayor's Court, was authorised to try all *civil and criminal cases.* It was authorised to punish offences by fine, imprisonment or corporal punishment etc. In civil cases, where the value exceeded three pagodas (nearly 9 rupees), and in all criminal cases where the offender was sentenced to lose life or limb, appeals from the decisions of the Mayor's Court lay to the Admiralty Court.

Since all the Judges in the Mayor's Court were lay persons, having no knowledge or training of law, the Charter directed that the Court would have attached to it an officer known as the Recorder. He was to be a man 'skilfull in the laws' and an English born covenanted servant of the Company. Peculiarly enough, Sir John Biggs, the Chief Judge of the Admiralty Court, was appointed to be the Recorder of this Court. He was to assist the Mayor's Court in the discharge of judicial work.

The Quorum of the Mayor's Court was to be the Mayor and two Aldermen. It sat once only in a fortnight. It decided criminal cases with the help of a jury.

REASONS FOR THE CREATION OF THE CORPORATION

The Company wanted to start certain public welfare activities on the settlement. For this, money was needed and it was expected that it might be easier for an institution, in which the native population of the place was represented, to raise funds by taxation. With this idea, the Corporation was started and it was hoped that it would make taxation acceptable to the native population. The first Corporation consisted of the representatives of the various communities that resided in the town of Madras. Out of the first twelve Aldermen, only three were British subjects. Out of the rest, three were Hindus, one Frenchman, two Portuguese and three Jews or Armenians. Similarly the Burgesses included the heads of the various castes. In this way, a composite body, consisting of all the important elements of the settlement, was created so that it might start some public utility works. But in fact, the institution did not work according to expectation. It neither raised taxes nor founded any municipal works. Its judicial wing, the Mayor's Court, however, continued to be active throughout the whole period and served the town by dispensing common justice, which it administered not according to any set regular legal system, but merely on the basis of 'justice and good conscience'. Its decisions, therefore, lacked uniformity and consistency.

THE CHOULTRY COURT

The Choultry Court, which was quite an important institution in the second period, continued to function during this period also though with diminished jurisdiction and powers. After the creation of the Mayor's Court, it was to dispense justice only in small offences and civil cases amounting to two pagodas. This, therefore, became a Court of petty jurisdiction. Two of the Aldermen were to sit twice a week at the Choultry to dispense justice in such minor cases.

In the third period, therefore, there functioned in Madras three Courts, viz. the Choultry Court, the Mayor's Court and the Court of Admiralty.

LATER HISTORY OF THE ADMIRALTY COURT

Sir Biggs died in 1689. In the absence of any other suitable person, the Governor and Council appointed themselves as the judges of the Admiralty Court. With them were associated two merchants, one an Armenian and the other a Hindu, to assist them in regard to native languages, laws, and customs.

This Court subsisted till 1692, when the Company sent out from England a new Judge for the Admiralty Court, John Dolben. The Court, consisting of John Dolben and two merchants, continued up to 1704, when on the return of the Judge to England, it was decided that his office should remain vacant. The Admiralty Court thereafter ceased to function. Its jurisdiction, including the hearing of appeals from the Mayor's Court, came to be exercised by the Governor and Council. After 1704, there functioned three Courts at Madras, viz. the Choultry Court, the Mayor's Court and the Court of the Governor and Council.

This system existed up to 1727, when a new leaf was turned over in the history of Judicial institutions in Madras, by the creation of a Mayor's Court[1]. The latter Court differed from the one of the same name already existing in Madras in many respects. The most important difference, however, was this: whereas the Mayor's Court of 1687 was merely the Company's Court, as it was started under the Charter issued by the Company itself, the Court of 1727 was a Crown's Court, having been established under the Royal Charter.

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1. See Chapter V.

CHAPTER III

ADMINISTRATION OF JUSTICE IN BOMBAY

INTRODUCTORY

The Portuguese were the first European nation to acquire Bombay in 1534 by cession from the king of Gujerat. In 1661, the island of Bombay was transferred to the English king Charles II, by the Portuguese king, as dowry, when the former married the sister of the latter.

The island of Bombay at this time was not a rich place as it grew to be. It was a small village having a few huts belonging to the fishermen. Finding it impossible to govern this small territory from England, Charles II, in 1668, transferred the island of Bombay to the East India Company for an insignificant annual rent of £ 10.

THE CHARTER OF 1668

At the time of the transfer, Charles II granted a Charter to the Company conferring on it powers requisite for the governing of Bombay. The Charter, *inter alia*, empowered the Company to *make, establish and ordain laws, ordinances and constitutions for the good government* of the island. This power of legislation, as usual, was subject to the twofold restrictions, namely, the laws and punishments to be prescribed for their breach were to be *reasonable* and that they were not to be *repugnant or contrary, but as near as may be agreeable to the laws of England.*

The Company was authorised to impose pains and penalties by way of fines, imprisonment or even death sentences.

The Charter further authorised the Company *to establish Courts of Judicature,* which were to be *similar to those established and used in England.* The Courts could determine and judge all actions, suits and causes. Their proceedings were to be reasonable, and were not to be repugnant or contrary to, but as near as might be agreeable to the laws of the kingdom of England.

In this way the Charter of 1668 granted to the Company very wide and ample powers for the purposes of administering and governing the island of Bombay. A characteristic feature of this Charter was that it contemplated the establishment of courts and laws in the settlement on the English lines. The Charter limited the Company's power of enacting laws, not only by requiring them to be 'consonant to reason, and not repugnant or contrary to' the English laws, but also by prescribing that they should be 'as near as may be agreeable to' such laws.

To begin with, the island of Bombay was under the control of the President and Council of the Surat Factory. Bombay had merely a Deputy Governor and a small Council. The Governor of the Surat Factory was ex-officio Governor of Bombay also.

FIRST JUDICIAL SYSTEM—1670

The first judicial system in Bombay was established in 1670. In this connection the name of Gerald Aungier, the Governor of the Surat factory must always be remembered. He is regarded as the 'true founder' of Bombay. It was he who created a system of Courts in the island for the purpose of administering justice to all.

The first judicial system of Bombay was a very simple affair. The island of Bombay was divided into two divisions; one division comprised of Bombay, Mazagaon and Girgaon; the other, Mahin, Parel, Sion and Worli.

A Court was started in each of these divisions. Each Court was to consist of four or five judges. They were to have powers to hear, try and determine cases of small thefts and all actions of a civil nature where the subject matter did not exceed 200 Xeraphins (nearly 150 rupees).

The Customs Officer in each of the divisions, who was an Englishman, was to be the President of the respective Court. Three judges were to form the quorum. Some of the judges were Indians. There were many reasons for appointing Indians

in these Courts. There was a paucity of suitable Englishmen, who could be spared from other duties, for the administration of justice. Besides, it was in accordance with the policy of *sweetening* the English Government to the native population of the island. All the judges were honorary. None of them received any emoluments for his work as judge in the Court.

In addition to these two Courts, a superior Court consisting of the Deputy Governor and Council was also started. This superior Court was to hear appeals from the lower Courts and was also to try all those cases, civil or criminal, which were beyond the jurisdiction of the lower Courts. The superior Court, therefore, enjoyed original as well as appellate jurisdiction. All trials in this Court were to be conducted with the help of jury.

However, Aungier was not satisfied with this system which, from all standards, was very preliminary. It suffered from two great drawbacks. In the first place, all the judges, whether in the Lower or in the Upper Court, were persons who had no knowledge even of the elementary principles of law. In the second place, the judicial system identified itself too much with the executive Government. There was no separation between the executive and the judiciary. But under the circumstances existing at the time, perhaps, Aungier could not have done better than this.

Aungier requested the Company to send some person, skilled in the laws, so that he might start Courts on a better basis. The request of Aungier went unheard. The Company was not willing to send lawyers in its nascent Indian settlements. It feared that a lawyer would only stir up strifes and contentions. While refusing, therefore, to send a lawyer, the Company advised Aungier to select some one from amongst the servants of the Company who might be knowing something of law and to carry on with him as Judge.

After some time, Aungier was successful in selecting one George Wilcox for the post of the Judge. The old system of

1670 was abolished and a new judicial scheme was put into force in Bombay in 1672.

THE SCHEME OF 1672

When Bombay was delivered to the English in 1665, it had been under the Portuguese rule for over a century and a quarter. Portuguese laws and customs had become firmly established there. The Charter of 1668, under which Bombay was transferred by Charles II to the Company, envisaged the application of the English law on the island. Nothing had yet been done to give effect to the Charter in this direction. The Company did not abolish the Portuguese laws and customs in 1670, when the first judicial system was started. It was only in 1672 that the Portuguese laws were formally abolished and English Law instituted instead. This was effected by means of a governmental proclamation issued on August 1, 1672, along with the creation of the new judicial system.

The scheme to administer justice put into force in 1672 was like this : A Court consisting of a judge was established in Bombay. This Court was to have jurisdiction in all causes, civil, criminal and testamentary. The Court was to sit once a week to try civil cases. Adequate provisions were made for speedy trials and decisions. All civil cases were tried with the help of Jury.

The procedure for the trial of criminal cases and administration of criminal justice was to be like this : Bombay was divided into four sections, viz. Bombay, Mahim, Mazagaon and Sion. In every division,[1] a Justice of the Peace, an Englishman, was appointed. His function was to arrest the accused and hold a preliminary examination of the witnesses. The Justice of the Peace, was to act, not as a punitive court, but only as a committing magistrate for his division. He was to send the record of the preliminary examination to the central Court, where the case was actually tried with the help of jury. The Justices of

1. In Bombay division there were to be two justices of the peace.

the Peace sat in the Court as assessors to help the Judge in his work of deciding criminal cases.

Appeals from the central Court lay to the Deputy Governor and Council of Bombay.

In order to promote pure justice, the Government decided to debar the Judge from carrying on any private trade. Instead, he was to get a pay of Rs. 2000/- per year, which was to be met from court fees as far as possible. To meet this and the other charges of the Court, a fee of Rs. 5/- per cent on every cause, determined in the Court, was levied. George Wilcox was appointed the first Judge of this Court.

COURT OF CONSCIENCE

Below this central Court, there was to be one other Court, for the purpose of deciding petty civil causes. This Court was known as the 'Court of Conscience'. The Court was designed to provide a forum to dispense justice to the poor without any cost. This Court was to sit once a week. It tried all cases under 20 Xeraphins. No court fee was charged. George Wilcox, the Judge of the main Court, presided over the Court of Conscience also. All trials here were summary and without a jury.

The judicial system of 1672 was designed to dispense justice at a very low cost. The whole charge of a civil action came to under twenty shillings. Not more than ten or twelve days were taken in deciding cases. Provision was made for enabling persons to sue as paupers where the plaintiff was not worth 60 Xeraphins.

This system continued to function up to the year 1683, when, due to the 'Keigwin's rebellion' on the island of Bombay, it stopped working. The island remained in the hands of the rebels for one year. They surrendered Bombay to the Company in 1684. Keigwin's rebellion may be taken as marking the end of the first phase in the evolution of judicial institutions at Bombay.

SECOND PHASE-COURT OF ADMIRALTY

The second phase in the development and growth of the system of administration of justice in Bombay, opened with the establishment of an Admiralty Court in 1684, under the Charter of 1683. This Court was exactly on the same lines as the one started in Madras in 1686[1]. Dr. John St. John was appointed as the Judge and the President of the Admiralty Court of Bombay. He was despatched by the Company from England *as being one learned in the Civil Law*, as directed by the Royal Charter.

The experiment of appointing a professional lawyer from England, however, failed in Bombay. The Admiralty Judge, Dr. John St. John, soon came into conflict with the President of the Surat Factory, Mr. Child.

At the outset, Dr. John acted not only as the Judge of the Admiralty Court, but also as the Chief Justice of Bombay. The Admiralty Court took cognisance not only of admiralty and maritime cases, which properly fell within the purview of the Charter of 1683, but also of other causes, civil and criminal arising in the town of Bombay. The arrangement was quite convenient. The Keigwin's rebellion had put an end to the ordinary Court of Judicature started in 1672. No such Court had been yet revived and the Admiralty Court was allowed to dispense justice in all cases.

But then, Dr. John lost favour with Mr. Child. The reason for this, as suggested by Fawcett[2], was that Dr. John had taken cognisance of some accusations against Mr. Child. He, therefore, decided to divest the Doctor of all other jurisdiction except that which strictly appertained to the Admiralty Court under the Charter. In 1685, another Court, on the lines of 1672, was started in Bombay to dispense common justice.

The Admiralty Court continued under Dr. John for a few more years thereafter. But the relations between him and

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1. See Page 17
2. First Century.....124

Child were never cordial. Ultimately, Dr. John was dismissed from his office in 1687.

The treatment that was meted out to Dr. John at Bombay was remarkably different from that accorded to Sir Biggs at Madras. The Company reposed exceptional confidence in Sir Biggs. In the words of Keith[1], Sir John Biggs was a '*protege* of the Company and enjoyed its favour'. He was, therefore, Judge of the Admiralty Court which acted also as the High Court of Madras and heard appeals from the Mayor's Court. He was also appointed as the Recorder of the Mayor's Court.

Dr. John, on the other hand, did not enjoy much confidence. The Company distrusted him from the outset. The Company had a general distrust in professional lawyers and was very reluctant to send them to the nascent settlements in India. The episode of Dr. John is merely a manifestation of this basic attitude of the authorities both in India and in England. The climax was hastened by the character of Dr. John and Mr. Child. The former was a man of independent character and he never lost an opportunity to assert his independence. The Government, however, was not in a mood to countenance any such independence on the part of the Judge.

Dr. John's episode made the Company all the more reluctant to appoint professional lawyers as Judges in India. In Bombay itself, no such thing was ever attempted for long. For a very long period, justice continued to be administered by lay Judges. It was only in the late eighteenth century, over one hundred years after Dr. John, that the first professional lawyer was appointed as the Judge in the newly created Recorder's Court[2].

Coming back, however, to the period under discussion; the year 1690 may be taken to signify the end of the second phase in the development of the judicature in Bombay. In that year Bombay was attacked by Siddi, the Admiral of the Mughal

1. Const. Hist. of India, 46
2. See Chapter VIII

Emperor. Bombay now fell on evil days. From 1690 to 1718 is the dark period in the history of the evolution of judiciary in Bombay when the orderly development of the Courts was interrupted.

PERIOD 1690-1718

In 1687, the seat of the President and Council was transferred from Surat to Bombay. No regular Court was established and justice was administered in a rough and ready way by the Governor and Council, who acted presumably under the Charter of Charles II. The administration of justice was at a very low ebb during this period.

THIRD PHASE—CREATION OF A COURT

After an eclipse of nearly 30 years in the sphere of law and justice, a new Court of Judicature was created on March 25, 1718.

The new Court consisted of a Chief Justice and nine other Judges. The Chief Justice and five Judges were to be Englishmen and the remaining four, Indians. The four Indian Judges were selected in such a way that they represented the four principal Indian communities residing on the island such as Hindu, Mohammedan, Portuguese Christian and Parsi. The Chief Justice and a number of other English Judges of the Court were members of the Council.

The Court had full power and authority to hear and determine all cases, civil and criminal, according to law, equity and good conscience and the rules and ordinances made by the Company. The Court was required to pay due regard to caste customs, orders of the Company and the known Laws of England. The Court was also to serve as a Registration House for the registry of sales of houses, lands and tenements. The Court was given jurisdiction in probate and administration matters also.

The Governor and Council were to hear appeals from this Court. The Company prescribed a fee of five rupees for making an appeal. The fees prescribed for various other items were very moderate. The quorum of the Court was to be three English Judges.

The Indians on the Bench, it appears, did not enjoy the same status as the English Judges. They were not treated as full fledged Judges of the Court. They appear to have acted merely as assessors. There are two reasons to warrant this surmise. Firstly, the quorum of the Court, as mentioned above, was to be three English Judges and the Indian members of the Court were not to be counted towards the quorum. Secondly, the records of this Court, now available to us, mention each English Judge by name at the beginning of each day's proceedings. But no Indian Judge is mentioned by name. All of them are mentioned collectively as *'Black Justices.'* These factors give rise to the presumption that the Indians on the Bench played only a *subsidiary role.* The Indians on the Bench, probably, were the leading citizens of Bombay and were associated with the Court, so that they might enlighten the English Judges on the peculiar manners and customs of the various castes and communities of the island, which the Englishmen had no means to ascertain. Their inclusion in the Court was presumably prompted by the precedent of the Mayor's Court of 1687 at Madras,[1] which also consisted of a number of the Indian representatives.

WORKING OF THE COURT

The Court sat once a week. The cases which it was called upon to decide were usually very simple. It decided all kinds of cases. Its proceedings were cheap and quick. It administered justice in a rough, ready and commonsense way. It was not bound by any technical rules, law or legal precedents. There were no lawyers to argue the cases. There were no codes, no law reports and no books of law.

Some interesting aspects of the Court's criminal work may be noted. In some cases the Court awarded imprisonment 'during pleasure' which meant an indefinite period. This appears to be very peculiar to us, for to-day even the worst offender is sent to prison only for a fixed period. The usual and the main punishment, inflicted by the Court, was whipping, thirty nine lashes being the normal punishment. In

1. See Page 18

serious cases, it was repeated twice or thrice. Lash fell equally on males as well as females. It was inflicted not in any private place but in the public, so that others also might learn a lesson. Theft of property worth forty shillings or more was not treated as a Capital Offence, as it then was in England. Fawcett mentions some cases where the Court applied English Law and even International Law. The Bench, therefore, had some regard to English or other Law, so far as it was known to them in appropriate cases in spite of there being no Bar to help it.[1]

The Court was not bound by technical rules and it would sometimes punish persons merely on suspicion and doubt, as opposed to proof. The modern rule, that a person should be punished only when his offence is proved beyond all reasonable doubt, was simply not known at this early time. Banishment from the Island also was one of the punishments and it was sometimes awarded to habitual and hardened offenders.

Unlike that of 1672, the Court of 1718 did not use a jury. Further, the Court of 1672 consisted of a Judge who was not a member of the Council. The new Court of 1718 mainly consisted of the members of the Council and was thus too much identified with the executive government of the settlement. In these two respects, therefore, the Court of 1718 was inferior to the former one of 1672.

But, the Court of 1718 was a distinct improvement on the Court of the Governor and Council, which immediately preceded it. The latter Court was composed entirely of the members of the Council, whereas the former Court, besides a few members of the Council, consisted also of an outside element in the four Indians.

The Court initiated in 1718 continued to function up to 1728, when it gave place to a better Court, known as the Mayor's Court, which was established in Bombay under the Royal Charter of 1726.

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CHAPTER IV

BRITISH SETTLEMENT AT CALCUTTA

FORT WILLIAM

The foundation of the premier Indian city of Calcutta was laid on 24th August, 1690, when a few Englishmen under the leadership of Job Charnock landed at Sutanati on the banks of the river Hughly. At this place, the Company started construction of a fortified factory. The fort was named as the Fort William, and the factory came to be known as the Factory of Fort William.

CALCUTTA

In 1698, the Company was able to secure the zemindary of the three adjacent villages of Calcutta, Sutanati and Govindpur from prince Azim-ush-Shan, grandson of Aurangzeb, who was the Subahdar of Bengal at the time. It was on the site of these three villages that the modern city of Calcutta grew up. In 1699, Calcutta was declared to be a Presidency; a President and Council were instituted to administer the settlement.

The acquisition of the zemindary of three villages by the Company was an event of great significance. As zemindars, the Company became entitled to exercise all those functions and powers in the zemindary area, as were commonly exercised at that time by the general body of zemindars in Bengal. *By the acquisition of zemindary,* the Company obtained a *legal and constitutional status* within the frame work of the Moghul administrative machinery.

ZEMINDARS IN BENGAL

During the palmy days of the Moghul Empire, the zemindars of Bengal had authority to collect land revenues and were under a responsibility to maintain law and order within their respective zemindary areas. Beyond this, they did not have any other power, much less any judicial power to decide civil or criminal cases. There used to be separate local Courts for this purpose. But when disintegration set in into the Moghul

administration, these local Courts ceased to function. A vacuum was created in the sphere of law and justice. There were some Courts at Murshidabad, the seat of the government of Bengal, but their authority had become cabined and confined only to the area round about the capital. In the absence of any regular judicial tribunals in the countryside, the zemindars themselves assumed the power to administer justice and they exercised it with a view, not to justice, but in their own interests.

REPORT OF THE COMMITTEE OF SECRECY

The Committee of Secrecy, appointed by the House of Commons in 1773, in its seventh report gives us a picture of the system as it worked at the time in Bengal. It is like this : Each zemindar maintained a Criminal Court to administer justice in criminal cases. His jurisdiction extended to all criminal cases including even those of a capital nature. A capital sentence, however, was not executed until it had been confirmed by the Nawab's government at Murshidabad.

Each zemindar maintained also a Cutcherry or Adalat to administer justice in civil cases and to decide cases relating to revenue. In civil cases, appeals from the zemindar's Court lay to the Nawab's Courts at Murshidabad.

In this way, the whole judicial power in the interior of the country had become vested in the zemindars.

ADMINISTRATION OF JUSTICE IN CALCUTTA

Since the day, it became the zemindar of the three villages, the Company began to exercise all those powers which the other zemindars in the country enjoyed. The government of the Company, at the settlement of Calcutta, appointed an English officer as the 'Collector'. He was to be a member of the Calcutta Council. He was to exercise all the zemindary functions in relation to the zemindary area, and so, he was often called as 'Zemindar'.

There were a large number of Natives residing in the

three villages. To administer justice to them, Courts were established on the usual pattern prevailing in the country.

The English Collector maintained a Fozdary Court to administer justice in criminal cases to the Natives. Procedure in this Court was summary. Trials were held without the help of a jury. The usual methods of punishment were whipping, fine, work on the roads, imprisonment, banishment from the settlement etc. In capital cases, however, the sentence was not executed until it had been confirmed by the Governor or the President. In all other cases, the Collector proceeded to sentence and punishment immediately after hearing. Death sentences at the time were inflicted, not by hanging, but by whipping to death.

JUSTICE IN CIVIL CASES

The Collector also maintained a Court or Cutcherry to decide civil causes arising among the Natives. The procedure of this Court also was very summary. Usually, the Court, instead of deciding civil cases by itself, referred them to arbitrators for their decision. The Court administered justice in accordance with the customs of the country. In the absence of customs, however, the discretion of the Collector was the deciding factor. Appeals from this Court lay to the Governor and Council.

The Collector was responsible for the collection of revenue from the zemindary lands. He took cognisance also of cases relating to revenue. Usually, he inflicted corporal punishment to force the defaulters to pay their arrears of revenue.

SPECIAL FEATURES OF THE SCHEME

This scheme for the administration of justice at Calcutta was generally modelled on the pattern of other zemindaries in Bengal. But its one special—or rather distinguishing—feature may be noted. It has been pointed out above that a capital sentence, passed on an offender by a zemindar, would not be executed until it was confirmed by the government of the

Nawab. But, unlike this practice, within the precincts of their zemindary, the English inflicted death sentences without seeking any confirmation from the Nawab. The Collector would execute the death sentence with the approval of the Governor and Council and no reference was made to the Nawab in this connection.

Further, as seen above, in civil cases also, appeals from a Court of a zemindar lay to the Nawab's Courts at Murshidabad. But no such appeals lay from the Collector's Court at Calcutta to the Murshidabad Courts. Appeals from the Collector's Court lay only to the Governor and his Council within the settlement. These features of the judicial scheme at Calcutta show that, from the very beginning, the Company's representatives at Calcutta asserted and exercised more powers than belonged to them as 'zemindar' under the customs prevailing in the land.

ADMINISTRATION OF JUSTICE TO THE ENGLISH

The Courts of the Collector administered justice not only to the Indians, but to the Englishmen also. In the sphere of criminal law and justice, however, the Collector's Court appears to take cognisance of only petty crimes and misdemeanours committed by the Englishmen. Serious criminal offences committed by them were taken cognisance of, by the Governor and Council, under the authority of the Charter of 1661.

The original system for the administration of justice in civil and criminal cases in Calcutta, though simple, was, however, very primitive and rudimentary. It was not at all conducive to a sound, effective or an impartial administration of justice. All judicial powers in the settlement were concentrated in one officer, the Collector. The authority vested in him was very extensive *'too great a trust for one single individual.'* The system, however, continued to operate up to 1727 when, in common with other Presidencies in India, a Mayor's Court was started at Calcutta also, under the Charter of 1726. Before that year, the Courts established at Calcutta were based on the Company's authority as zemindar. After 1726, the Courts came to derive their authority from the Royal Charters.

CHAPTER V

THE MAYOR'S COURT

INTRODUCTORY

The year 1726 marked the beginning of a new phase in the evolution of judicial institutions in India. George I, King of England, granted a Charter to the Company in that year. This Charter played a very significant role in the development of legal institutions in the three presidencies, Calcutta, Madras and Bombay. The Courts were put on an entirely new basis. The Charter established, for the first time, Crown Courts in the presidencies on a uniform and definite basis. It also effected some other significant changes in the administrative set up of the three principal stations, as for example, the establishment of Corporations. The Charter of 1726 had also a legislative significance of its own.

On account of its great importance in the sphere of law and justice, the Charter of 1726 is usually called as the 'Judicial Charter'.

REASONS FOR ITS GRANT

The factors which led to the grant of this all important Charter were these : The Courts and the system of administration of justice in the presidencies were not very satisfactory. The three settlements had grown in population, trade and commerce. The Company felt that there was a 'great want at Madras, Fort William and Bombay, of a proper and competent power and authority for the more speedy and effectual administering of justice in civil causes, and for trying and punishing of capital and other criminal offences and misdemeanours'. The Company was of the opinion that grant to it, of additional judicial powers, which might be used for 'punishing of vice, and administering of justice', would be conducive to a better government of these settlements, and would result in the increase of their prosperity, and, consequently, the national trade and revenue. The Company was very anxious to

effect improvements in the prevailing judicial arrangements in the presidencies.

Further, a Corporation had been created in Madras in 1687, and the Company was anxious to create similar Corporations in Bombay and Calcutta also. Whatever reasons induced the Company to establish a Corporation at Madras, they were also present in the case of Bombay and Calcutta.

Moreover, many an Englishman died in India leaving behind immovable property and movable effects. There was no competent Court in any of the towns at the time, which could undertake a proper distribution of property of a deceased Englishman, in accordance with his will, if any, or in accordance with the law of intestate succession. The absence of such a jurisdiction in India involved the Company in vexatious and frivolous suits in England at the hands of the relatives of the deceased persons. There was thus a great necessity of a Court in each of the presidencies which might have jurisdiction to take cognisance of such matters. It was also requisite that such a Court be established under Royal authority, so that, its judgments and proceedings in such matters might command respect and be recognised by the Courts in England, without being called into question.

All these circumstances combined to lead the Company to request King George I to grant it a new Charter, and this he did on 24th September, 1726.

PROVISIONS OF THE CHARTER

The Charter of 1726 provided, *inter alia*, for the creation of a Corporation at each of the three principal stations of the Company, namely Calcutta, Bombay and Madras. The Corporation was to consist of a Mayor and nine Aldermen. The Mayor and seven Aldermen were to be the natural born subjects of the English Crown. The remaining two Aldermen could, however, be the subjects of any other prince or state in amity with the English King.

The first Mayor and the nine Aldermen were appointed by the Charter itself.

The Mayor was to hold office for one year only. The Aldermen were to remain in office for life or residence in the town. Every year, the Mayor and Aldermen themselves were to elect a new Mayor out of the Aldermen. Any vacancy among the Aldermen was to be filled by the Mayor and the remaining Aldermen themselves from amongst the inhabitants of the town.

All the office bearers, the Mayor and the Aldermen, were required to take oath of office before the Governor and Council of the presidency.

The Governor and Council were empowered to remove any of the Aldermen from his office, on reasonable cause being shown against him. The aggrieved Alderman, however, had a right to appeal to the King in Council in England against his dismissal.

THE MAYOR'S COURT

The Mayor and the Aldermen, at each of the three presidency towns, *were to form a court of record* by the name of the Mayor's Court. It was, however, not necessary for the Mayor and all the nine Aldermen to sit in the Court as Judges. The quorum of the Mayor's Court was to be *three.*

This Court was authorized to *hear and try all civil suits* arising within the town and its subordinate factories. Appeals from the decisions of the Mayor's Court lay to the Governor and Council. A further right of appeal, from the Court of the Governor and Council, was also provided for. In all cases, involving 1000 pagodas or more, a second appeal lay to the King in Council. The decisions of the Governor and Council were to be final in cases involving less than one thousand pagodas.

The Mayor's Court, being a Court of *record,* could commit persons who were guilty of its contempt.

The Charter of 1726 did not lay down in explicit terms what law the Mayor's Court was to administer. It merely said that the Court would *render its decisions according to justice and right.* Now, the Charter of 1661 had expressly prescribed English Law according to which justice was to be administered by the Governor and Council in each settlement of the Company. In the context, therefore, it was very clear that the Mayor's Court also was to be a Court of English Law.

The Mayor's Court was further vested with a testamentary jurisdiction. The Court was authorised to grant probates of wills left behind by the deceased Englishmen. In case a person died intestate, the Mayor's Court was empowered to grant letters of administration to a near relative; failing him, to any other person deemed proper by the Court for the purpose.

COURT TO PUNISH CRIMES

The Mayor's Court was not to have any jurisdiction in criminal cases. It was a Court only of civil and testamentary jurisdiction.

The criminal jurisdiction was conferred on the Governor and the five senior members of the Council at each presidency. In the first place, each one of them was appointed as a Justice of the Peace, and, in this capacity, they could arrest persons accused of having committed crimes, and could, individually, punish those who were guilty of petty offences.

In the second place, the Governor and the five seniors of the Council, were to form a court of record. All of them, or any three of them, were authorised to hold quarter sessions of peace four times a year. As such, they could try and punish each and every criminal offence, except high treason. They were to enjoy, in the technical English terminology, the powers of a court of 'Oyer and Terminer' and 'Gaol Delivery'. A person, vested with these powers in England, was authorised to try each offence, howsoever serious it might be. The Governor and the five members of the Council, or any three of them,

thus collectively, were empowered *to try each offence committed within the presidency town, or in any factory subordinate thereto.*

The Charter of 1726 made provisions for the employment of the Grand Jury as well as the Petty Jury by the Court of Quarter Sessions for the trial of criminal offences.

The function of the Grand Jury was to make presentments of persons who were suspected of having committed crimes. Another more descriptive name of the Grand Jury was the 'Jury of Presentment'. But apart from presenting suspected persons out of their own knowledge, this Jury had another important function to discharge. When a suspected person was arrested, he was brought before a Justice of the Peace for a preliminary inquiry. The Justice of the Peace examined the prisoner and his accusers, put the evidence against the prisoner into writing, sent the report to the Court of the Governor and Council before which the actual trial of the offender was to take place. But before the actual trial started in this Court, the evidence for the prosecution—accusation or indictment as it was technically called—was again placed before the Grand Jury, and their duty was simply to decide whether, on the evidence of the prosecution, there was a case to go for trial or not. If they found that no *prima facie* case was made out against the accused, they would ignore the charge. If a majority was satisfied with the propriety of the case going to trial, the jury would return a 'true bill'. The indictment was then said to have been 'found' and was brought into the Court by the foreman of the Grand Jury and two other jurors, so that the actual trial might start.

After the indictment had been found the next step was to try the prisoner. For this purpose a new jury, called the Petty Jury, would be empanelled, to hear both sides and try the issues of fact. If the Petty Jury returned the verdict 'guilty' for the prisoner, he was to be sentenced by the Court of Quarter Sessions.

The Grand Jury consisted of twenty three persons.[1]

The Charter of 1726, introduced all the technical forms and procedures of the English criminal judicature in the three presidencies. The Charter in very explicit terms laid down that the procedure, manner and form that the Justices of the Peace and the Commissioners of Oyer and Terminer and Gaol Delivery were to use in conducting trials, punishing and convicting persons accused of crimes or offences, were to be the same, 'or the like manner and form, as near as the circumstances and condition of the place and the inhabitants will admit of,' as the similar Courts and Justices in England 'do or proceed'.

LEGISLATIVE BODY

Hitherto, the power of making laws was vested in the Company which could be exercised only in England, by the General Court or the Court of the Directors of the Company. This was definitely inconvenient as persons in England, not being conversant with local conditions in India, could not effectively use the legislative power and make suitable laws. Plainly, it was very desirable that persons on the spot, who understood the local conditions and circumstances, be endowed with the authority to enact laws. The creation of Corporations made a change in this direction very essential and desirable.

Accordingly, the Charter of 1726, empowered the Governor and Council of each presidency to make by-laws, rules, and ordinances for the good government and regulation of the Corporation and the inhabitants of the respective town. The Governor and Council could impose reasonable pains and penalties. The by-laws and the rules, as also the punishments fortheir breach, were to be *'agreeable to reason'* and not *'contrary to the laws and statutes of England.'* Further, no such by-law or rule was to be of any effect until and unless it had been approved and confirmed in writing by the Court of Directors of the Company.

1. By a statute of 1351 in England it was laid down that no member of a Grand Jury could sit on a Petty Jury if 'challenged' for this cause by the accused.

In this way, the Charter of 1726 created three 'subordinate powers of legislation' in India, one at each of the three presidency towns.

CHARTER OF 1726 COMPARED TO MADRAS CHARTER OF 1687

The Charter of 1726, creating a Corporation and several Courts in each Presidency, was on lines parallel to the Madras Charter of 1687. But, nevertheless, there were certain important differences between the two.

In the first place, the new Mayor's Court was to have jurisdiction only in civil cases. It did not have any criminal jurisdiction. The old Madras Mayor's Court had a wider jurisdiction as it was competent to take cognisance of all cases, civil as well as criminal.

In the second place, appeals from the new Mayor's Court lay to the Governor and Council of the respective settlement. In all cases involving one thousand pagodas or more, a further appeal from the Governor and Council lay to the King in Council in England. For the first time, therefore, an appeal from an Indian Court was allowed to lie to the King-in-Council. Appeals from the old Madras Mayor's Court, however, lay to the Admiralty Court at Madras.

Thirdly, the Mayor's Court of 1726 was a Crown's Court having been brought into existence by a Royal Charter. The old Madras Mayor's Court, on the other hand, was purely and simply, a Court of the Company, as it was created by the Company by a Charter of its own.

Further, the old Mayor's Court did not have any jurisdiction in testamentary matters, whereas the new Mayor's Court had such a jurisdiction-

There was another very significant difference between the two Courts. The old Mayor's Court at Madras had a lawyer attached to it in the capacity of the 'Recorder'. He was to advise the Court on complicated legal problems. The new Mayor's Court, however, did not have any such officer, though

its Judges were, as usual, lay persons and in no way superior in legal knowledge or learning to those who constituted the earlier Court. In this respect, the later Court compared unfavourably with the previous Court.

The Madras Corporation of 1687 consisted of twelve Aldermen, out of whom at least three were to be Englishmen; the rest could belong to any other nationality, and so many of them were Indians. These Aldermen sat as Judges in the Mayor's Court, and this Court, therefore, consisted of quite a good number of Indians as Judges.

The new Corporation, on the other hand, was to consist of a Mayor and nine Aldermen, out of whom all except two were to be Englishmen. The new Mayor's Court was thus too much English ridden. Whereas, the old Court was started with no less than nine Indian Judges, the new Mayor's Court had all English Judges to start with, and in its subsequent working also, no Indian ever came to be appointed to it. All the Judges in this Court used to be the English servants of the Company.

The old Madras Mayor's Court was not bound by any technical rules of law and procedure. It was more a Court of equity rather than of law. The Judges decided causes in accordance with their discretion and sense of fair-play. The Mayor's Court of 1726, however, was a court of English Law, and its procedure was modelled on the lines of the courts in England.

Under the arrangements that prevailed in Madras during the period 1687 to 1726, criminal justice was administered by the Mayor's Court as also by the Admiralty Court The executive government there, did not play any part in this sphere. By the Charter of 1726, however, this authority was re-transferred to the Governor and five senior members of the Council. They were authorised to try all offences except high treason. This was certainly a retrograde step for Madras. Having once divested the executive government of its judicial powers, it can

not be regarded to be a progressive step, by any test or standard, to invest in them again the powers of administering justice in so important a branch as criminal law. To secure liberty and property, it is absolutely necessary to have a separation between executive, on the one hand, and judiciary, on the other. Looked from this point of view, the Charter of 1726 was inferior to that of 1687.

WORKING OF THE MAYORS' COURTS : 1726-1753

The post Charter period was marked in each presidency with disputes and conflicts between the government, on the one hand, the Corporation, and the Mayor's Court, on the other.

The Corporation created by the Charter of 1726 was an autonomous body, to a very great extent free from the control of the executive government of the presidency. The Charter showed restraint in the authority it conferred on the President and Council over the Corporation and the Mayor's Court. Appointment of the Aldermen to the Corporation was not in their hands. The tenure of an Alderman was for life. A vacancy among them was to be filled by the process of co-option by the Mayor and the remaining Aldermen, without any reference being made to the Government. Further, the Corporation was to elect its own Mayor. The Governor and Council could remove an Alderman for misconduct in his office, but they could do so only after a proper hearing of his defence and not for extraneous reasons. Moreover, the dismissed Alderman had a right of appeal to the King in Council against the orders of the Governor and Council.

The Governor and Council became the Court of Appeal from the decisions of the Mayor's Court, this being subject to a further right of appeal to the King in Council in all cases where the value of the property in dispute exceeded 1,000 pagodas or 3,000 rupees.

The cumulative effect of all these provisions was to make the Corporation, and also the Mayor's Court, independent of

the executive government. The all important principle that the courts must be separate from the executive, appears to have found a place in the judicial arrangements of 1726 though not to its full logical conclusions. Appeals from the Mayor's Court lay to the executive government. Also, a majority of the Judges in the Mayor's Court happened to be the servants of the Company; and in the field of criminal justice, the executive wielded all the powers. But nevertheless, the adoption of the principle of independence of the judiciary, even though partially, was a very wholesome and fortunate development. The Mayor's Court could be expected to try and hear cases without any interference from the government.

But this feature, the independence of the judiciary from the executive, which was a definite advance over the past arrangements, proved to be irksome to the Company. The governments of the Company in the Indian presidencies, sought to interfere in the affairs of the Mayors' Courts. The Judges of the Mayors' Courts, far from being servile to the governments, resented such interference and always asserted their independence. The Courts, practically in all the three settlements, revealed a praiseworthy inclination to defend the judicial powers conferred on them by the Charter. This inevitably led to much heart burning. The relations between the governments, on the one hand, the Corporations and the Mayors' Courts, on the other, were far from being cordial and harmonious. Many cases arose where the government of a presidency wanted the Mayor's Court to act in a particular way, and the latter refusing to act accordingly.

One such case occurred in Bombay in 1730. A Hindu woman became a convert to Christianity. Her son, aged about twelve years, left her and went to live with a relative. The mother charged the relative with improperly detaining some jewels, and as a sequel, the Mayor's Court ordered the relative to deliver the boy to his mother. The heads of the caste complained to the Governor. The Governor and Council resolved that the Mayor's Court had no authority to determine 'causes of a religious nature or disputes

concerning castes among the Natives.' The Mayor's Court, however, strongly protested against this and held that under the Charter it had jurisdiction to decide such cases. As a result of this case, the relations between the two bodies became very much strained.[1]

This was followed by another minor dispute in the same year. An Arab merchant sued in the Mayor's Court to recover the value of pearls said to have been extorted from him by his rescuers from a burning boat off the coast of Gujerat[2]. The defendant had been previously tried for piracy in regard to the same occurrence and acquitted. The Council suggested to the Mayor's Court that the claim of the merchant was not valid. The Mayor's Court, however, ignored this suggestion of the Council, and decreed the suit. On appeal, this decision was reversed by the Governor and Council. The relations between the two bodies thus became all the more bitter.

Similar factions arose in Madras as well as Calcutta. And the cause of the conflict was the same—undue interference in the affairs of the Court by the executive government.

The spirit of independence shown by the Mayors' Courts was very commendable and fortunate. The independence of judiciary is the *sine qua non* for a pure administration of justice. But from the Company's point of view such 'independency', as the Company styled it, was very inconvenient and obnoxious. In its opinion the conduct of the Mayors' Courts was factious and discourteous ; that they had assumed greater powers than had been conferred on them by the Charter, and that 'they had been wanting in a due deference and respect' to the governments which after all were their ' superiors'. They, therefore, decided to get rid of the causes which had led to this annoying state of affairs. They decided to strengthen the executive even though it might be at the cost of the judiciary, and this the Company decided to effect at the earliest available opportunity. This was achieved in 1753 by a new Charter ;

1. Fawcett, The First Century of British Justice in India, 218.
2. Fawcett, 220.

autonomy of the Courts was snatched away, and they were made subservient to the executive.

THE CHARTER OF 1726 AND THE NATIVES

Besides creating animosity between the Mayors' Courts and the Governments, the Charter of 1726 gave rise to yet another difficulty. The Mayors' Courts at various presidencies used to take cognisance of cases relating to caste and religious matters among the Natives, and this they did in accordance with their own notions of law and justice. It has already been pointed out that the Mayors' Courts were the Courts of English Law and were not required to keep in view the peculiar customs and manners of the Indians. The attitude of the Company in this respect was that the Natives, if they so desired, might not bring their disputes before the Mayors' Courts and could decide them among themselves according to their own customs, laws and manners; but if they came before these Courts then, the Company insisted, they would be subject to the English Law and nothing else.

The procedure of the Mayors' Courts was very different from the traditions, manners and habits of the Indians. Each case tried by these Courts, therefore, generated some heat and passion among the Indian inhabitants of the settlements. One such incident, occurring in Bombay and arising out of the change of religion of a Hindu woman, has already been pointed out above. This incident led the Natives to make representations to the Governor and Council, who resolved that the Mayor's Court was not entitled to take into consideration cases affecting the religious and caste questions of the Natives, and to this the Bench strongly protested.

A similar incident occurred in Madras also. There the Mayor's Court insisted on respectable Hindus to take the pagoda oath instead of the Geeta oath. The Hindus regarded this sort of oath, which was taken in a temple, as obnoxious and derogatory. In 1736, the Madras Mayor's Court imprisoned two Hindu merchants on their refusing to take the pagoda oath. This infuriated the Hindu residents, who

collected in a crowd and went to the Governor. Apprehending breach of peace, the Governor intervened and released the two arrested men on parole. The inhabitants of Madras thereafter sent a petition to the Court of Directors stating their grievances and proposing that they be exempted from the jurisdiction of the Mayor's Court, except only in those cases where both the parties agreed to refer the case to the Court for its decision.

The Charter of 1753 did away with this cause of dissatisfaction also.

THE CHARTER OF 1753 :

In 1746 the French captured Madras, occupied it for three years, and surrendered it again to the English in 1749. During this period, the Corporation of Madras, established under the Charter of 1726, was suspended. In 1749, however, the Company desired to revive this institution. But it was suggested by lawyers that due to its foreign occupation the Charter of 1726, so far as it related to Madras, had lapsed. The Company accordingly requested the Crown for a new Charter, which King George II issued on 8th January, 1753. The new Charter was made applicable not only to Madras, but to Bombay and Calcutta as well.

The Charter of 1753 was designed to steer clear of the defects that the Charter of 1726 had revealed. The Charter of 1753 was, therefore, a modified version of the previous Charter. It continued, with certain readjustments, the same old arrangements of 1726 in all the three presidencies.

Firstly, to put an end to the dissensions and disaffection that had developed in each presidency between the Corporation and the Mayor's Court, on the one hand, and the government, on the other, the Charter of 1753 *made the Corporation subservient to the government.* This was effected by changing the method of appointing the Mayor and the Aldermen. Under the Charter of 1726, the Mayor and Aldermen combined were to elect a Mayor for one year, without making any reference to the government. Under the new dispensation of 1753,

the Mayor and the Aldermen were to elect a panel of two names, out of which the Governor and Council were to select one to act as the Mayor. In a large measure, therefore, the Mayor became the nominee of the government. Again, under the Charter of 1726, a vacancy among the Aldermen was to be filled by the process of co-option by the Mayor and the remaining Aldermen without making any reference to the government. This method was scrapped by the Charter of 1753 according to which all the Aldermen were henceforth to be appointed by the Governor and Council. The executive government thus secured a complete control over the Corporation. The government could appoint and dismiss the Aldermen, and so the Corporation lost much of its former independence. Consequently, the Mayor's Court, being a part of the Corporation, also lost its former autonomy.

Secondly, the Charter of 1753 effected a significant change in the jurisdiction of the Mayor's Court. The Charter expressly excepted from its jurisdiction all suits and actions between the natives only, and directed that these suits and actions should be determined among themselves, unless both the parties submitted them to the determination of the Court.

Another significant feature of the new Charter was the erection of a 'Court of Requests' at each presidency town. The purpose of this Court was to provide a means for cheap and quick decisions in cases of small monetary value. The jurisdiction of the Court of Requests was limited to *five pagodas*, or *nearly fifteen rupees*. The Court was to be manned by Commissioners, numbering between eight and twenty four, three of them sitting at a time by rotation. The Court was to sit once a week. The first Commissioners of the Court were to be appointed by the Governor and Council. Thereafter, one half of the Commissioners were to retire every year, the remaining Commissioners filling the vacant place by ballot. Next year, the other half of the Commissioners would retire, their places being filled by ballot by the remaining Commissioners.

In all other respects, the Charter of 1753 was similar to that of 1726. The creation of an additional Court, the Court of Requests, at each presidency was a definite improvement over the arrangements of 1726. This Court was expected to give relief to poor litigants, whose cases of small value could now, be disposed of summarily, cheaply and quickly.

But, the Charter of 1753 was definitely inferior to that of 1726, in so far as it made the Corporation, and thereby the Mayor's Court, subservient to the executive government of the place. To deprive the Court of its autonomy and independence, was a retrograde step.

COURTS UNDER THE CHARTER OF 1753 :

The Charter of 1753 established the following Courts in each presidency town :

1. The Court of Requests, to decide civil cases up to five pagodas ;

2. The Mayor's Court, a court of civil jurisdiction to decide cases above five pagodas. It could not, however, take cognisance of cases among the Natives unless both the parties to a dispute agreed to submit it to its determination. Its jurisdiction over the Natives was thus voluntary, depending upon the discretion of both the parties ;

3. The Court of the President and Council to decide criminal cases.

4. The Court of the President and Council, having appellate jurisdiction, to hear appeals from the decisions of the Mayor's Court.

In the last resort, the King in Council were to act as the ultimate Court of Appeal from the Court of the President and Council in all civil cases involving 1,000 pagodas or more.

COURTS FOR THE NATIVES

As pointed out above, the Charter of 1753 excluded from the purview of the Mayor's Court, all cases arising among the natives, except when both the parties voluntarily brought their

disputes before the Court for its decision. Further, the Mayor's Court was a Court of English Law, and as such, it could not be of much use to the Indians whose peculiar customs, usages and laws did not receive proper attention in this Court. In small cases up to five pagodas, the Court of Requests in each presidency dispensed justice to all. But, for deciding cases of a higher value among the natives, it was evidently necessary to have some other suitable tribunal in each presidency.

Calcutta presented no difficulty in this respect. A Zemindary Court, which the Company created in its capacity of a zemindar, had already been functioning there since 1690. This Court had not ceased working even after the advent of the Mayor's Court in 1726, and it continued to function and dispense justice to the natives, as usual, after 1753.

No additional Court was ever created in Bombay for dispensing justice to the natives in cases beyond five pagodas. In the absence of such tribunal the native inhabitants of Bombay continued to resort to the Mayor's Court for getting their disputes settled. The Mayor's Court on its part did not observe the restriction imposed on its jurisdiction in such cases by the Charter of 1753. The Bombay Mayor's Court, in practice, ignored the restrictive words limiting its jurisdiction over the natives to voluntary contests. Its view appears to have been that the natives of Bombay were all British subjects (due to the fact that Bombay had been ceded to the English in full sovereignty by the Portuguese) and so the restrictive words in the Charter did not apply to them. The Mayor's Court dispensed justice to all as if there was no limitation or restriction on its jurisdiction.[1] It is the opinion of Morley that it does not appear that 'the native inhabitants of Bombay were ever actually exempted from the jurisdiction of the

1. Perozeboye v. Ardaseer, Mor. Dig. II,335, 344

Mayor's Court, or that any peculiar laws were administered to them in that Court.'[1]

At Madras, however, no satisfactory arrangement to administer justice to the natives was made for long. The Mayor's Court would not take into consideration any case among them unless both the parties to the suit agreed, and it was not always easy to secure the requisite agreement of both the parties. The fact that one of the parties could object to the jurisdiction of the Mayor's Court evidently led to many difficulties to genuine litigants. For a long time, therefore, there was denial of justice to the native inhabitants of the settlement. The absence of a suitable court, competent to dispense justice to them in civil cases thus caused them much difficulty and inconvenience.

It was only in 1796 that a simple Court under a servant of the Company was improvised for the purpose of deciding civil cases among the natives. It used to sit twice a week. This Court functioned only for a very short period as it gave place to the Recorder's Court in 1798.[2]

DEFECTS IN THE JUDICIAL SYSTEM OF 1753

The Mayor's Court, in each presidency, in practice, consisted of the servants of the Company, who were appointed by the Governor and Council as the Aldermen of the Corporation. The Court could not, therefore, be a very effective instrument of justice. Being too much dependent for their services on the Company, these servants could not be expected to take a detached view in cases in which the Company itself figured as a party.

Further, the servants of the Company themselves carried on their own private trade and commerce at this time. As such, a number of disputes were bound to arise between them and the native inhabitants of the presidency. The Mayor's Court, consisting as it did of the junior servants of the

1. Mor. Dig. I, clxix.
2. See Chapter VIII.

Company, could not be expected to be an effective instrument of justice in such cases, as it could not take an unprejudiced view of the matter in which servants of the Company happened to be involved. In the words of Ferminger, 'The weakness of the judicatures of 1726 and 1753 arose from the fact that they tended to be in fact but branches of the Company's executive government, and they therefore afforded imperfect means of resistance to the class interests of the Company's servants at a time when the Company's servants were bidding fair to monopolise the trade of the country'.[1]

Ferminger further goes on to point out that the Aldermen of the Mayor's Court were, as a rule, anything but what the term 'alderman etymologically implies' : they were mostly junior servants of the Company in the days when the Company's servants without any special training at home, began their Indian career a little more than midway in their teens. A system under which the executive government and judicial authority were combined in the hands of men who had commercial interests of their own to defend, must essentially be a very weak system from the point of view of security of life and property of the people.

The Mayor's Court was a court of English Law. But, the Judges in this Court were lay persons who had no legal knowledge or education. The servants of the Company, who were called upon to administer English Law as Judges in the Mayor's Court, were persons who hardly had any training in the technical rules of English Law. There were no codes, no reports and no lawyers available in any of the settlements at the time. Under these circumstances, the Mayor's Court was hardly in a position to administer justice in accordance with any fixed system of law, much less the English Law. Its judgments had necessarily to be based on discretion, common sense and the sense of fair play of the Judges. As most of the litigation at the time was of a simple character, the Mayor's Court was in a position to discharge its work in a simple and

1. Fifth Rep. Introduction lxxix.

prompt manner. But in cases involving intricate and difficult questions of law, the Court had to consult the legal authorities in England to seek their guidance. A reference to law authorities at London, however, was a very dilatory, tedious and a tardy process.

Similarly, the Governor and Council, though required in the discharge of their criminal jurisdiction to act in the same way as did the parallel bodies in England, were completely ignorant of the technicalities of the English criminal law and procedure. The Charters of 1726 and 1753 thus introduced the forms of the English judicature in the three Indian settlements without, at the same time, taking care to provide for competent and suitable persons to work them.

The judicial and administrative system, as it functioned under the Charter of 1753, was too much executive ridden. The Governor and Council had the power to legislate. They enjoyed executive and administrative powers, as also, the judicial powers in criminal and civil cases. The whole system thus tended towards despotism without there being any adequate safeguard for the liberty and property of the people.

The Governor and members of the Council decided all criminal cases. As such, they would also try a member of the Council or any other servant of the Company in case he was accused of any crime. It was too much to expect that in such cases the Criminal Court would take a detached and unprejudiced view of the matter.

The territorial jurisdiction of all the Courts started under the Charter of 1753 was confined within the limits of the respective settlement. There was thus no forum to take cognisance of cases arising beyond these territorial limits. And certainly, the activities of the Englishmen had extended much beyond these limits.

The judicial system of the presidencies, under the Charter of 1753, was thus very weak and defective. Justice administered by the Mayor's Court was not very good or efficient. The one redeeming feature, however, was the provision

for appeals from their decisions to the King in Council as an ultimate Court of Appeal. But, from a practical point of view, this was merely an empty form, for none in those days could afford the time and money to pursue appeals before that august body. No appeal actually went to the King in Council for a long time after the Charter of 1753.

The one factor which provided a stimulus towards the proper administration of justice was the Company's supervision of the three Mayors' Courts. Every year copies of the Registers of their proceedings were submitted to the Company, which were scrutinised by its counsels. Thereafter, the Company made comments and observations on their proceedings. These comments impressed on the Mayors' Courts the fundamental principles of the English Law and gave them useful instructions on many points that ensured a fair trial. The Company thus made efforts to keep the Courts in the straight and narrow path of the English Law.

In the sphere of criminal law and justice, the only redeeming feature of the system of 1753 was the institution of Jury for all criminal cases in the Sessions Court of Oyer and Terminer consisting of the Governor and members of the Council. Only in this way, could there be any check on the unlimited powers of the executive government.

In 1772, the House of Commons appointed a Committee of Secrecy to go into the affairs of the Company. This Committee closely scrutinised the working of the Mayor's Court at Calcutta, and gave an adverse verdict regarding its efficacy as an instrument of justice with the result that in 1773, the Regulating Act made provisions for the creation of the Supreme Court of Judicature in place of the Mayor's Court at Calcutta. The Supreme Court was designed to be free from the multifarious defects with which the Mayor's Court suffered. The Supreme Court was to consist of professional lawyers from England as Judges. The Judges were to be appointed by the Crown and not by the Company. The Supreme Court was thus to be independent of the Company or its government at

Calcutta. Unlike the Judges of the Mayor's Court, the professional Judges of the Supreme Court did not suffer from the handicap of being deficient in legal knowledge and learning. The Supreme Court was in a position to take an unprejudiced and objective view in all cases in which the Company or any of its servants happened to be involved.

In course of time, the Mayors' Courts at Bombay and Madras also gave way to the Supreme Courts[1] of Judicature.

The Mayors' Courts as such might not have been very effective and efficient instruments of justice. They themselves might have suffered from a number of defects and shortcomings. Nevertheless, these Courts formed important and useful links in the chain of the evolution of judiciary in India. In their own way, they were a distinct improvement in the methods of administration of justice that prevailed on the eve of their establishment. And further, they in their own turn paved the way for the establishment of better and improved Courts of the nineteenth century.

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1. See Chapter VIII.

CHAPTER VI

THE BEGINNING OF THE ADALAT SYSTEM (1772-74)

INTRODUCTORY

Hitherto, the Company had under its sway and control only three tiny settlements of Calcutta, Bombay and Madras wherein, in course of time, a system of government and administration of justice had come to be created. As time passed on, the Company expanded its political activities and was successful in bringing new territories under its jurisdiction. The responsibilities of the Company grew ; it had to govern the new acquisitions ; it had to provide for an effective administration of justice to the people. In the sphere of law and justice, the Company discharged its obligation by creating, what is known as, the Adalat System.

The Company acquired first the provinces of Bengal, Bihar and Orissa. There it started the first Adalat System, in 1772. From time to time this Adalat System was improved, modified, adapted and changed.

Later on, the Company acquired territory round about the presidencies of Madras and Bombay. The Adalat Systems were established there also. The rise and progress of the provinces of Bombay and Madras practically took the same course as in Bengal. In fact the provinces of Bengal, Bihar and Orissa served as a laboratory, where experiments were made, and when workable results were achieved, they were transmitted to the provinces of Bombay and Madras.[1]

THE COMPANY BECOMES THE DIWAN

In 1756, Siraj-ud-daula became the Nawab of Bengal. Being jealous and apprehensive of the growing English power in Bengal, he attacked Calcutta, captured it and turned the English out in the very first year of his reign. In 1757 the English returned to Bengal under the leadership of Clive and

1. See Post Ch. XIV

recaptured Calcutta. In the same year, the famous battle of Plassey was fought between the Nawab and the English, in which the former was vanquished. The Company thus became supreme in Bengal.

Had the Company so desired it could have taken over the government of Bengal, Bihar and Orissa[1] directly in its hands. But the Company did not attempt anything like that. It became satisfied by placing its own nominee, Mir Jafar, on the throne of Bengal.

Mir Jafar could not continue as Nawab for long. He soon lost favour with the Governor and Council at Calcutta. In 1760 a change in the nawabship took place, Mir Kasim replacing Mir Jafar. Mir Kasim in his own turn was again changed with Mir Jafar in 1763.

With every change in the nawabship, the power of the Company in Bengal increased. The fact that the Calcutta Government could effect successive changes in the nawabship of Bengal shows that the real authority had passed into the hands of the Company. But still, the Company did not take over the government of Bengal, Bihar and Orissa directly in its own hands, because it feared that such a course would have some undesirable repercussions in England and in other European countries. The Company realised that the direct assumption of government of these provinces would invite parliamentary interference in its affairs as also it would give rise to jealousy in French and Portuguese quarters; and it wanted to avoid both.

In 1765, however, the affairs of the Company in Bengal took a significant turn. The Moghul Emperor, Shah Alam, who still claimed a nominal sovereignty over Bengal, made over to the Company *the Diwani* of Bengal, Bihar and Orissa, in lieu of twenty six lacs of rupees that the Company promised to pay him annually.

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1. Bengal, Bihar and Orissa then formed one administrative unit. During the Moghul regime, it was under one Nawab.

SIGNIFICANCE OF THE DIWANI

Under the Moghul administrative system, the government in the province, then known as the Subah, was conducted by two high dignitaries, viz., the Nawab and the Diwan. The Nawab, who was also known as the Nazim, was the head of the government and the military and was also responsible for maintenance of law and order. The department under his control was known as the Nizamat. Being responsible for the maintenance of law and order, the *Nawab supervised the administration of criminal justice* also. Diwan, the other high functionary, was below the Nawab in rank, prestige and authority. His function was to collect revenue and *decide revenue and other civil cases.* His department was known as the Diwani.

Both the officers, Nazim and Diwan, were appointed by the Central Government. The Diwan would collect revenue, defray the expenses of the Nizamat and then remit the balance to the Central Treasury. The idea of keeping these two functionaries in a Subah and bifurcating all the administrative functions between them, was to create a system of checks and balances. The system was adopted as the Central Government always apprehended lest the far-flung provinces should become independent of it. All the powers, of military as well as of money, were not vested in one single individual. One had the power of military without having money at the same time; the other had money without having military. If one of the officers went wrong the other was expected to keep him under his control.

The office of the Diwani, which was granted to the Company in 1765, thus comprised of two main functions, namely the collection of land revenue and the administration of justice in civil and revenue cases.

The grant of the Diwani to the Company would have left the Nawab or the Nazim of Bengal, theoretically, with the powers of administering justice in criminal cases, maintaining law and order and keeping military. But the Company was

interested in making the Nawab impotent and completely devoid of any substantial power or function. By a treaty with the Company, therefore, the Nawab agreed to accept fifty three lacs of rupees as an annual allowance for his maintenance. He also agreed not to keep any military under him, which was, henceforth, to be maintained solely by the Company. The Company in this way secured the power of collecting land revenues from the Emperor and the right of maintaining the army from the Nawab and thus became the *de facto* authority in Bengal. Along with this, however, the Company became responsible for the civil government of the new territory and also for the dispensation of justice in civil and revenue cases. The responsibility to dispense justice in criminal cases, however, was left with the Nawab who was to meet the necessary expenses for this purpose from the allowance of 53 lacs of rupees granted to him by the Company.

EXECUTION OF THE DIWANI FUNCTIONS

The Company did not at once take over the execution of the Diwani functions after the grant. It did not employ its own servants to discharge these functions. Instead, it appointed two Indian officers, Mohammad Reza Khan at Murshidabad and Raja Shitab Roy at Patna, and the actual administration of the Diwani was left in their hands. They supervised the collection of land revenue and the dispensation of justice in civil as well as revenue matters.

The system proved to be very inefficient and ruinous for the country. Every person was out to exploit and plunder the country and use the opportunity to his own personal advantage. None felt any responsibility for the welfare of the people. The English servants of the Company, who had power but no obligation, misused their position to their own selfish ends. Every one was after enriching himself, and that too very quickly, at the cost of the poor subjects of Bengal, Bihar and Orissa. The result was that within a very short time conditions in Bengal became very bad. There was utter confusion all around. A fine, flourishing and once a pros-

perous country, Bengal was now verging on its ruin. There was hunger, starvation and misery all around. The unhappy state of affairs was bound to affect the collection of revenue, which, consequently, fell appreciably. The Company suspected misappropriation on the part of the Indian officers. To reap full advantage of the Diwani, the Company decided in 1772 to 'stand forth as Diwan', and to take over the entire care and management of the Diwani functions and discharge them directly through the agency of its own servants.

The man to accomplish this mission was Warren Hastings, who was the Governor of Calcutta at the time. In 1772, therefore, a new scheme for the collection of revenue was put into force. Along with this, a plan for the administration of justice in the provinces of Bengal, Bihar and Orissa was also initiated. The whole new administrative set up was designed by Warren Hastings and the servants of the Company were to play the major roles in it.

In this way, for the first time, in 1772 there came to be established an Adalat System for the administration of justice to the common people in the mofussil of Bengal, Bihar and Orissa, beyond the presidency town of Calcutta.

JUDICIAL PLAN UNDER THE MOGHULS

The Muslim Rulers had been successful in establishing a fairly well regulated system of judicature in Bengal. There was a network of Kazis, appointed by the government to administer common justice throughout the country. At Murshidabad, the seat of the government, there functioned a number of central Courts. They were :

1. Court of the Nawab or the Nazim : The Nawab was the highest officer of the government. He was responsible for the maintenance of law and order and also the administration of criminal justice. His was the highest Court for criminal cases. He used to preside personally at the trial of persons accused of capital offences.

2. Court of the Diwan : He was the highest financial

officer of the government being responsible for the collection of revenue and also for a proper administration of justice in revenue and other civil cases. He used to hear appeals in civil cases from the lower Courts of the Kazis.

3. The Darogah Adalat al Alia : In the beginning, this Darogah was merely the Deputy of the Nawab in his Court. With the passage of time, it became impossible for the Nawab, due to many pre-occupations, to attend personally to the judicial work in his Court. The Daroga Adalat al Alia then began to exercise all those judicial functions which appertained to the Nawab.

4. The Daroga-i-Adalat Diwani : He was the Deputy of the Diwan. In course of time, the Diwan ceased to exercise his jurisdiction in person which then came to be exe cuted by the Daroga. He decided cases relating to revenue and property.

The main business of these central Courts was to hear appeals from the lower Courts in the districts and look after the general administration of justice. There was no very clear cut demarcation of jurisdiction and functions among these Courts. They were not merely Courts of Appeal ; they would entertain even an original cause if brought before them.

Besides the above-mentioned Courts at Murshidabad, there were certain other local authorities also which interested themselves only in cases arising within the town. There was a Kazi to decide civil cases and claims of inheritance and succession. Mufti, who used to be a very learned jurist, expounded the law for the Kazi and helped him in the discharge of his judicial functions. The Fauzdar judged all cases of crimes not capital. The Mohtassib had cognisance of drunkenness, selling of liquors and the examination of false weights and measures.

With the weakening of the power of the Nawab, the whole system of government and administration of justice disintegrated. The Courts of the Kazis in the districts ceased to function ; their places were filled by the zemindars who

usurped to themselves the function of administering justice in civil, criminal and revenue cases. The proceedings of their courts were very summary and unsatisfactory. There was no fair or impartial dispensation of justice. Fines imposed by the zemindars were appropriated by them to their own use. They charged a heavy fee for their service, the usual levy being a quarter of the property recovered through their Courts. The sittings of the central Courts at Murshidabad also became very irregular. They had no influence whatsoever beyond the circle round about Murshidabad. The state of affairs was very deplorable and, in fact, the whole judicial system had degenerated into machine of oppression and exploitation of the poor subjects.

Corrupt judges, a corrupt government and the absence of any register of appeals added to the defects of the legal system. In the words of Keith, 'The forms of justice thus existed, but it is clear that the Courts were the instruments of power rather than of justice, useless as means of protection, but apt instruments for oppression.' He further goes on to say, 'It is significant of the position that the servants of the Company, when they had claims against Indians, not residing under the British flag but in the vicinity of the Company's settlements, used simply to seize and hold them prisoners until they consented to pay, without asking the authority of any officer of the native government, but with its full approval. The government indeed was so complaisant as to overlook cases of seizures of persons who did not fall within this category, and after the Company's acquisition of the diwani both the French and the Dutch exercised like rights, the French at least disputing the demand of the president and council that recourse in such cases must be had to the law courts.'

Keith continues: 'The course of justice was further troubled by the revolution, which placed Mir Kasim in power, for many Englishmen with or without the consent of the Company soon scattered through the interior to seize the trade, and exerted wide influence on the administration of justice, and the overthrow of Mir Kasim led to further encroachments on

native authority, the banyans or native agents of the English often controlling the local courts and even acting as judges.'[1]

It was in the context of these chaotic circumstances that Warren Hastings was called upon to formulate a scheme for the execution of the Diwani functions through the instrumentality of the Company's servants. The crying need of the day was to introduce reforms in the existing judicial set up in the country.

Hastings very well realised that for a proper collection of revenues there should be peace and order in the country and that this, to a very great extent, depended on a fair and effective administration of justice. Hastings knew that the prosperity of the country depended upon a free, easily accessible and impartially administered justice. These considerations led Warren Hastings to establish in 1772 a scheme, not only for the collection of revenue in Bengal, Bihar and Orissa, but also for a proper administration of justice in the country.

THE JUDICIAL PLAN OF 1772

The judicial plan of 1772 was based on the ancient and traditional division of authority between the Nizam or Nawab and the Diwan. To the Nizam, as the supreme executive power, was apportioned the criminal, and to the Diwan, the civil jurisdiction. Following this distinction, separate Courts were established in the country for administering justice in civil and criminal cases.

The Judicial Plan of 1772 was devised with a district as the administrative unit. The whole Diwani area comprising of Bengal, Bihar and Orissa was divided into several districts. In each district an officer, an English servant of the Company, was appointed as the Collector. He was responsible, in the first instance, for the collection of revenue in his district.

A Court for deciding civil cases was established in each district. The Court was known as the Mofussil Diwani Adalat.

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1. Keith, *A Constitutional History of India*, 63, 64.

The Collector of the district was to preside as the Judge in this Court. The Mofussil Diwani Adalat was authorised to decide all civil causes including real and personal property, inheritance, caste, marriage, debts, disputed accounts, contracts, partnerships, and demands of rent.

A Court for the trial of criminals was also established in each district. This Court was known as the Mofussil Nizamat or Fozdary Adalat. Here, the native law officers, Kazi or Mufti assisted by two moulvies, used to sit as Judges to decide all sorts of criminal cases. The function of the Moulvies was to expound the Mohammedan law of crimes, the function of the Kazi or Mufti being to give *futwa* in terms of this exposition and render judgment accordingly.

The Collector of the district was to exercise a supervisory control over the Mofussil Fozdary Adalat in his district. He was to see that the Court summoned and examined necessary evidence, that its decisions were fair and impartial and that it heard all causes regularly. The Mofussil Fozdary Adalat could not finally determine cases involving capital sentence or forfeiture of the accused person's property. Such cases were to be remitted for final orders to a Senior Court known as the Sadar Fozdary Adalat situated at Calcutta.

SADAR COURTS

Besides the lower Courts established in every district, two superior courts of Justice were created at Calcutta. One of them was known as the Sadar Diwani Adalat; the other, as the Sadar Fozdary or Nizamat Adalat.

The Sadar Diwani Adalat consisted of the Governor and the members of his Council. Its function was to hear appeals from the decisions of the Mofussil Diwani Adalats in all causes involving above five hundred rupees.

The Sadar Nizamat Adalat was to consist of an Indian Judge, to be known as the Daroga. He was to be appointed by the Nawab. He was to be assisted by the Chief Kazi, Chief Mufti and three Moulvies. The function of this Court was to

revise the proceedings of the Mofussil Nizamat Adalats. No capital sentence could be awarded by the Mofussil Fozdary Adalats without the approval of the Sadar Nizamat Adalat. If the Sadar Court approved the infliction of the capital sentence in a particular case, it would prepare the warrant ordering its execution. This warrant was to be signed by the Nawab, who was still regarded as the nominal Head of the Nizamat, and so, all forms to give countenance to that theory were scrupulously observed.

The Governor and Council at Fort William exercised a supervisory control on the proceedings of the Sadar Fozdary Adalat, in the same way as the Collector, over the Mofussil Adalat in his district.

MISCELLANEOUS PROVISIONS

In order to facilitate decisions in small cases, the Judicial Plan of 1772 provided that disputes involving a subject matter up to the value of ten rupees would be decided by the Head Farmer in the Pergunnah where that dispute happened to arise. This provision was very necessary in order to save people from travelling long distances from their homes to the District Headquarters in quest of justice in petty causes at the cost of much money, time and energy.

The Diwani Adalats were directed to decide all cases of inheritance, marriage, caste and other religious usages and institutions according to '*the laws of the Koran with regard to the Mohammedans, and the laws of the Shaster with respect to the Hindus.* The provision, in other words meant the Muslim law and the Hindu law for Muslims and Hindus respectively. Now, the persons who were called upon to administer these systems of laws—the English covenanted servants of the Company, who acted as the Collectors and also as the Judges in the Mofussil Diwani Adalats—were completely ignorant of them. To make the system workable, Hastings provided these lay Judges with the help of the native law officers, Kazi and Pondit. To enable the Collector-Judge to discharge his functions, the Judicial Plan of 1772 provided that Moulvies or Pondits would attend

on the Court, according to the nature of the case, and expound the law applicable to the facts and circumstances of the cause in dispute. The Judge was then to decide the dispute in accordance with this exposition of the law.

Further, certain precautions were taken to promote pure and impartial justice in the country. It was thus laid down that all Courts would maintain proper registers and records, that the Mofussil Diwani Adalats would transmit their records to the Sadar Diwani Adalat and that all cases would be heard in the open court.

To make justice cheap, all the old vexatious impositions levied earlier on the dispensation of justice by the courts of the zemindars, were abolished. Instead, a moderate table of fees was prescribed for the decision of civil causes at the hands of the new Diwani Adalats.

THE JUDICIAL PLAN OF 1774

The system which Hastings established in 1772 was not destined to remain in tact for long. It suffered from one major defect. Under it, the Collectors in the districts enjoyed very large powers. A Collector was the chief executive officer of the government and as such he looked after the Collection of revenue in the district. At the same time, the collector presided over the Mofussil Diwani Adalat in the district and decided all civil causes. Further, he also exercised a supervisory control over the Mofussil Fozdary Adalat and saw that it functioned regularly and properly. The Collector was thus at once the administrator, the judge and the magistrate in the district.

In those days, means of communication were extremely slow. It was, therefore, virtually impossible for the Government at Calcutta to keep a close watch on the activities of the Collectors in the districts. Moreover, the servants of the Company in those days enjoyed the privilege of carrying on their own private trade, and as such, the Collectors also carried on their own trade in the respective district. Under these

circumstances, there was every possibility that the Collectors, uncontrolled from above, would monopolize the trade of the country and exercise the vast powers vested in them to further their own selfish ends. There was a great danger of the Collector reducing himself to a tyrant in the district, oppressing the ryots, misusing and abusing his position of authority to his own personal advantage.

Warren Hastings was conscious of this capital defect in his scheme of 1772 and he was anxious to modify it in this respect at the earliest. In 1773, the Court of Directors of the Company also directed him to withdraw the Collectors from the districts and to make some other suitable arrangements.

As a consequence of this, Warren Hastings recalled the Collectors from the districts in 1774. The whole structure of the plan of 1772 revolved around the Collector. The withdrawal of Collectors, therefore, necessitated a thorough going reconstruction of the plan. And so, in 1774, Warren Hastings introduced a new plan for the collection of revenue and the administration of justice in the provinces of Bengal, Bihar and Orissa. The main features of the new scheme were as follows :

The provinces of Bengal, Bihar and Orissa were divided into six Divisions, the Divisional Headquarters being at Calcutta, Burdwan, Murshidabad, Dinajpore, Dacca and Patna.

In each of these Divisions, a small council consisting of four or five English covenanted servants of the Company was appointed. The council was to be known as the Provincial Council and its main function was to look after the collection of the revenue in the Division.

Each Division comprised of several districts. In each district, an Indian Officer, known as the Diwan or Amil, was appointed in place of the former Collector. The Amil or Diwan was responsible for the collection of revenue in his district. He was also to sit as the Judge in the Mofussil Diwani Adalat in his district in the same way as the Collector used to do formerly.

In the old scheme, appeals from the Mofussil Diwani Adalats used to lie to the Sadar Diwani Adalat at Calcutta in all cases over five hundred rupees. In the new scheme of 1774, the place of the English Collector having been taken by the Indian Officer, it was thought proper and necessary to institute a closer supervision over his work. With this idea, it was provided that in all cases decided by the Mofussil Diwani Adalat, appeals could go to the Provincial Council of the Division, which in this capacity came to be known as the Provincial Court of Appeal. Decisions of the Provincial Court of Appeal were to be final in all cases involving up to one thousand rupees, beyond which sum, appeals could further go to the Sadar Diwani Adalat. The Sadar Diwani Adalat, as usual, was to consist of the Governor and members of his Council.

At the Divisional Headquarters, which was the seat of the Provincial Council and so also of the Provincial Court of Appeal, no additional Court of first instance was created. The Provincial Court of Appeal itself was to take cognisance of all civil causes arising there.

The new Provincial Councils thus became important and vital links in the whole scheme of the collection of revenue and the administration of justice. They performed three-fold functions. In the first place, each council was responsible for the collection of revenue in the Division. In the second place, each council, as Provincial Court of Appeal, used to hear appeals from the decisions of the Mofussil Diwani Adalats in the districts. In the third place, each Council, as a Court, took cognisance of all civil cases, in the first instance, arising within the town in which it had its seat.

The Judicial Plan of 1774 continued in operation in Bengal, Bihar and Orissa till 1780, when it was modified again by Warren Hastings in many vital respects.

CHAPTER VII

THE SUPREME COURT OF JUDICATURE AT FORT WILLIAM

INTRODUCTORY

From 1756 onwards Bengal was in the grip of anarchy, chaos and confusion.

The Battle of Plassey in 1756 had, in effect, transferred the real power and authority in Bengal to the Company. Though Providence had placed this vast power in its hands, the Company was not willing to assume it and discharge it through the agency of its servants. Instead of taking over the government of the Bengal Subah, which included Bihar and Orissa also, the Company was content with placing its nominee on the Bengal throne as Nawab and leaving to him the civil government of the country. The Nawab at the time was a spent force, effete and incapable of efficient action. He was incapable of providing Bengal with an authoritative, well ordered and well regulated government. Only the forms of administration were maintained without any essence. Bengal in effect was without a government.

The servants of the Company in Bengal enjoyed all the power and prestige unencumbered by any sense of responsibility for the welfare of the people. Their salaries were far too low. They enjoyed a right to carry on their own private trade. The Nawab's government was nominal and ineffective. The servants of the Company, being anxious to amass as much wealth as possible in a very short time, began to indulge in the exploitation of the country. Corruption prevailed in their ranks. The Governor and Council at Calcutta were wholly incapable to induce moderation in the tendency of the Company's servants to enrich themselves, for its own members suffered from the same urge. Uncontrolled from everyquarter, the Company's representatives in Bengal indulged in committing extortions and oppressions in the country with impunity.

The only ideal before them was to get rich and they exploited every opportunity to that end.

All this anarchy was bound to tell on the economic conditions and prosperity of the country. In 1770 there occurred a famine in Bengal in which about one fifth of its population perished.

With their easily gotten wealth—rather spoils of the East—the servants of the Company returned home and led there a kind of life, the pattern of which was completely out of harmony with the prevailing English notions and social conditions. Due to their insolence and overbearing character, the newly enriched ex-servants of the Company came to be nicknamed as *Nawabs* by the English people. They utilised their wealth in purchasing seats in the Commons and thus offended the territorial magnates.

The display of wealth by the ex-servants of the Company, coupled with the news of famine in Bengal, led the British public to suspect that there was something palpably wrong in the system of administration of Bengal. The English public opinion was crystallising in favour of parliamentary interference in the affairs of the Company. The anarchy of Bengal was plainly intolerable and the Parliament was certain to intervene. The climax was reached when due to its financial embarrassments, the Company had to beg the British Government for a loan. The Parliament, naturally enough, was not in a mood to grant a loan to the Company until it was subjected to certain regulations for the better administration of its affairs in India. Consequently, the House of Commons appointed a Select Committee and a Secret Committee to inquire into the state of affairs in Bengal. In a number of reports, they pointed out the various defects and shortcomings existing in the structure of the Company, its government at Calcutta and the judicial system existing there.[1] All these circumstances led the Parliament to enact the Regulating

1. See Chapter V, Page 55.

Act in 1773. This Act modified the constitution of the Company, changed the structure of the government at Fort William and Bengal, and established the Supreme Court of Judicature at Fort William.

PROVISIONS OF THE REGULATING ACT : CONSTITUTION OF THE COMPANY AMENDED

The Regulating Act sought to remove some of the evils which had their operation in the Company's constitution.

On the eve of the passage of the Regulating Act, the affairs of the Company in England were regulated by the Court of twenty four Directors, all of whom were elected every year by the Court of Proprietors, or the General Court of the share holders of the Company.

The Regulating Act modified this practice because it was felt that it was necessary to secure continuity in the direction of the Company's affairs. Under the new arrangements, only one fourth of the Directors i.e. six in number, were to retire in rotation every year. The Directors, therefore, were to hold office for four years.

The Regulating Act restricted the voting power only to those share holders who had a stock of £1000 instead of £500 as theretofore. This was done to deprive a number of smaller share holders of their votes. The step, it was thought, would improve the quality of the Court of Proprietors and would also prevent power from being readily purchased by servants of the Company. Further, the Act, in certain respects, tightened the control and hold of the British Government over the Company.

THE GOVERNMENT OF BENGAL

To meet the evils which operated in India, certain changes were introduced in the administrative system of the Presidency of Calcutta and the Diwani Provinces of Bengal, Bihar and Orissa.

The town of Calcutta was regarded as the British settlement, as it had been recaptured by the English in 1756 from

the Nawab of Bengal by force of arms and, therefore, the sovereignty over this area was regarded as vested in the English Crown. The provinces of Bengal, Bihar and Orissa, on the other hand, were not yet regarded as the British territories. The sovereignty over this area was vested *de jure* in the Mughal Emperor. The Company, though *de facto* supreme, was *de jure* merely a Diwan. *The provinces of Bengal, Bihar and Orissa had not yet been formally annexed by the British Crown, and the shadow and the fiction of the Nawab was suffered to exist.* As a matter of legal theory, therefore, the inhabitants of Calcutta were regarded as the subjects of the British Crown, whereas the inhabitants of Bengal, Bihar and Orissa beyond Calcutta were not yet so regarded. They were considered to be the subjects of the Mughal Emperor and his representative, the Nawab of Bengal.

The Regulating Act scrupulously sought to observe and maintain this theoretical distinction between the status of Calcutta, on the one hand, and that of Bengal, Bihar and Orissa, on the other. For the purposes of administration of Calcutta and the Presidency of Fort William, the Act appointed a *Governor General and a Council of four persons.* The whole civil and military government of the Presidency was to be vested in this body. The same body was also to be responsible for the 'ordering, management and the government' of the Diwani lands.

Warren Hastings was appointed as the first Governor General. Three out of the four members of the Council were despatched to India from England. Each one of them was to hold office for five years but could be removed earlier by the King on the recommendation of the Court of Directors. All the decisions in the Council were to be arrived at by a majority of votes. The Governor General did not have any special privilege of vetoing the majority; he had only one vote, though in case of a tie he could have a casting vote also. Under the new arrangements a majority of the Council had power to

defeat the Governor General's policy. In this respect the Regulating Act continued the old practice prevailing up to that time.

Another significant change made in the administrative system of India was to put the presidencies of Bombay and Madras in matters of war and peace, under the control of the Calcutta Government. But, this was subject to two vital exceptions ; that of imminent necessity which would render postponement of war dangerous, and the receipt of special orders direct to the government from the Court of Directors. The subordinate governments were required to transmit regularly to the Governor General, information about all the transactions relating to the government, revenues or interests of the Company.

THE SUPREME COURT

Perhaps, the most remarkable clauses of the Regulating Act were those which provided for the creation of the Supreme Court of Judicature at Calcutta in lieu of the Mayor's Court, functioning there under the Charter of 1753. The Mayor's Court, as has already been pointed out, constituted a very weak, imperfect and unsatisfactory instrument to administer justice. It suffered from many evils and defects. To provide for a better and more effective judicial tribunal, the Regulating Act empowered the Crown of England to create by means of a Royal Charter, the Supreme Court of Judicature at Calcutta. The Act specified the lines on which the Charter of the Supreme Court was to be issued. The Regulating Act laid down that the Supreme Court would consist of a Chief Justice and three Puisne Judges, all of whom were to be appointed by the Crown. They were to hold office *during the pleasure of the Crown.* Each of these Judges was to be a professional lawyer, being a barrister of at least five years' standing.

The Supreme Court was to enjoy a very wide jurisdiction. It was authorised to decide civil cases. It was authorised to administer justice in criminal cases in the character of a Court of Oyer and Terminer and Gaol Delivery for Calcutta,

the factory of Fort William and the factories subordinate there—to, in the same way as in England. Grand Jury and Petty Jury consisting of British subjects resident in the town of Calcutta were to be used for the trial of criminal cases. The Court was further empowered to exercise Admiralty and Ecclesiastical jurisdiction.

The Court was to be a Court of Record.

The jurisdiction of the Court, however, was limited in respect of the persons to whom it was to apply. The jurisdiction of the Court was to extend to :

(a) All British subjects residing in Bengal, Bihar and Orissa ;

(b) All of His Majesty's subjects residing in Bengal, Bihar and Orissa ;

(c) All persons employed by, or directly or indirectly in the service of, the Company or any of His Majesty's subjects ;

Besides, the Court was authorised to hear and determine any suit or action by any of His Majesty's subjects against any inhabitant of India residing within the provinces of Bengal, Bihar and Orissa, if :

(i) There was a contract or agreement in writing between the said inhabitant and His Majesty's subject, and

(ii) In the agreement the said inhabitant agreed that in case of a dispute, the matter would be heard and determined in the Supreme Court, and

(iii) The cause of action exceeded five hundred rupees.

Such an action or suit could be brought in the Supreme Court of Judicature, either in the first instance, or by way of appeal from the sentence or order of any of the Courts established by the Company in the Diwani area.

The Supreme Court was *declared to be ineligible to hear and try* any indictment or information against the Governor

General or any member of the Council in any case except *Treason* or *Felony*.

The Governor General and Council, and the Judges of the Supreme Court, were, by the 38th section of the Regulating Act, authorised to act as Justices of the Peace and to hold Quarter Sessions.

The Governor General, members of the Council, and the Judges of the Supreme Court were to be immune from arrest or imprisonment at the hands of the Supreme Court.

The Act directed that the Charter to be issued by the King, establishing the Supreme Court, was to contain provisions allowing appeals to the King in Council from the decisions, judgments, or determinations of the Supreme Court under such conditions and circumstances as were thought reasonable and proper by the Crown and laid down in the Charter.

The Act further laid down that if and when the Crown issued the Charter to establish the Supreme Court at Fort William, so much of the Charter of 1753 as related to the Mayor's Court and the Criminal Courts at Calcutta, would come to an end. In all other respects, however, that Charter was to continue in operation and be of full force.

LEGISLATIVE AUTHORITY

The Regulating Act made substantial changes in the legislative methods and forms Prevailing at the presidency of Fort William. Hitherto, under the Charter of 1753, the Governor and Council of the Presidency could make laws, none of which, however, was to be of any force until it was confirmed in writing by the Court of Directors. The Court of Directors could thus veto any enactment passed by the Governor and Council.[1]

The Regulating Act changed this legislative procedure in a significant manner. By section 36, the Governor General and

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1. See Chapter V, Page 41.

Council at Fort William in Bengal were authorised to make such *rules, ordinances and regulations* for the good order and civil government of the settlement of Fort William and other factories and places subordinate thereto, as they deemed to be *just and reasonable*. This legislative power was subject to the conditions that the laws to be passed were *to be reasonable* and *not to be repugnant to the Laws of the English Kingdom*.

None of the laws so framed by the Governor General and Council, however, was to be valid, or of any force or effect, until it *was registered and published in the Supreme Court of Judicature*. It was possible for any person in India to appeal against any such law, after its registration at the Supreme Court, to the King in Council, who was empowered to set aside or repeal any such law if he thought fit. Such an appeal had to be lodged in the Supreme Court within sixty days after the registration of the law there. Such an appeal against a law of the Governor General and Council could also be lodged within sixty days of its publication in England by any person residing there.

The Act further provided that the King in Council, without any such appeal, on their own motion, could disapprove and disallow any such rule or regulation within a period of two years from the date of its passage by the Governor General and Council.

The new procedure was designed to obviate the long delays which were necessarily involved in securing consent of the Company's Directors from England to any proposed piece of legislation under the arrangements made by the Charter of 1753. At the same time, in the Supreme Court, an effective check on hasty legislation was also provided for.

MISCELLANEOUS PROVISIONS

The Regulating Act contained a series of clauses designed to eradicate the many flagrant abuses prevailing in the Indian administrative machinery at the time. The Governor General, members of the Council and the Judges of the Supreme Court

were prohibited from receiving presents or engaging in private trade. No officer, civil or military, was to accept presents from any native prince or power. No officer engaged in the revenue collection was to engage in private trade. The Court of King's Bench in England was empowered to punish offences committed against the Act, or any crime, misdemeanour or offence against any of His Majesty's subjects or of the inhabitants of India.

THE CHARTER OF THE SUPREME COURT

To give effect to the express provisions of the Regulating Act, the King of England, George III, issued a Royal Charter on March 26, 1774, establishing the Supreme Court of Judicature at Fort William in Bengal. The function of the Charter was to define in greater details, amplify and explain more explicitly, the various powers and jurisdictions conferred on the Supreme Court under the Regulating Act. The Charter created the Supreme Court of Judicature at Fort William in Bengal and made it a Court of Record.

The Charter appointed Sir Elijah Impey as the Chief Justice, and Robert Chambers, Stephen Caesar LeMaistre, John Hyde, as the three Puisne Judges of the Supreme Court. All these gentlemen fulfilled the basic qualification of being barristers of England of at least five years' standing.

The Supreme Court, in the first place, was to have power and jurisdiction to hear, try and determine all civil causes, actions and suits, arising against :

(a) The Mayor and Aldermen of Calcutta ;

(b) Any of His Majesty's subjects residing within the provinces of Bengal, Bihar and Orissa ;

(c) Any person, who was employed by, or was directly or indirectly in the service of, (i) The Company, (ii) The Corporation of Calcutta, or (iii) Any of His Majesty's subjects ;

(d) The Company ; and

(e) Any inhabitant of Bengal, Bihar and Orissa, if—

(i) He entered into any contract or agreement in writing ;

(ii) The other party to such a contract was His Majesty's subject ;

(iii) The cause of action exceeded five hundred rupees ; and

(iv) The Indian inhabitant in this contract agreed that in case of dispute, the matter would be determined in the Supreme Court of Judicature at Fort William.

The Charter laid down that under the circumstances detailed above, the matter could be heard and determined in the Supreme Court of Judicature, either in the first instance, or by way of appeal from the decision of a Court of Justice established in the country by the Company.

The Supreme Court, in the second place, was to be a Court of Equity, and as such was to have full power and authority to administer justice as nearly as may be, according to the rules and proceedings of the High Court of Chancery in Great Britain.

The Charter vested the Supreme Court, in the third place, with criminal jurisdiction. The Supreme Court was to be a Court of Oyer and Terminer and Gaol Delivery, in and for the town of Calcutta, the factory of Fort William, and the factories subordinate thereto. In this capacity, it was to have the same powers and authority, as the Justices of Oyer and Terminer and Gaol Delivery had or exercised in England. The Court was to administer criminal justice, in such manner and form, or as nearly as the conditions and circumstances of the place and persons admitted of, as the Courts of Oyer and Terminer and Gaol Delivery did in England.

The Court was to use Grand Jury and Petty Jury, composed of the subjects of Great Britain resident in the town of Calcutta.[1]

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1. For explanation of the terms see Ch. V, Page 41.

The Court was further authorised to hear, determine and judge all crimes, felonies and misdemeanours committed in the provinces of Bengal, Bihar and Orissa, by :—

(a) Any of His Majesty's subjects ; and
(b) Any person employed by, or being directly or indirectly in the service of, the Company, or any of His Majesty's subjects.

The Supreme Court, in the fourth place, was empowered to exercise Ecclesiastical jurisdiction throughout the provinces of Bengal, Bihar and Orissa, on the British subjects residing there. As such, the Court could grant probates of wills and testaments of the British subjects dying within the three provinces of Bengal, Bihar and Orissa. It could issue letters of administration for the effects of the British subject dying intestate or dying without appointing an executor to his will.

The Charter authorized and empowered the Supreme Court to appoint guardians and keepers for infants and their estates and also guardians and keepers of insane persons, according to the rules prevalent in England.

The Supreme Court was further constituted into a Court of Admiralty for the provinces of Bengal, Bihar and Orissa. The Court was thus to hear and try all cases, civil and maritime in the same way as the Admiralty used to do in England. The Court was to have power to try, with the help of a petty jury consisting of British subjects resident in the town of Calcutta, all crimes maritime, committed on the High Seas, according to the laws and customs of the Admiralty in England. This maritime jurisdiction was to extend to His Majesty's subjects residing in Bengal, Bihar and Orissa and persons directly or indirectly in the service of the Company or any of His Majesty's subjects.

The Judges of the Supreme Court were to have the same jurisdiction and authority as the Justices of the Court of King's Bench in England under the Common Law. The authority of the Judges of the Supreme Court was thus assimilated to that of the Judges of the King's Bench.

The Supreme Court was to supersede the Mayor's Court and the Court of Oyer and Terminer and Gaol Delivery composed of the Governor and Council working under the Charter of 1753. The Supreme Court did not, however, abolish the Court of Requests established at Calcutta by the Charter of 1753. The Court of Requests continued to function as usual even after the establishment of the Supreme Court.

The Regulating Act, as noted above, had appointed the Governor General and members of the Council, and the Judges of the Supreme Court as Justices of the Peace, and authorized them to hold Quarter Sessions.

With an idea to ensure that the Court of Requests and the Justices of the Peace, and the Court of the Quarter Sessions to be held by the Justices of the Peace at Calcutta might answer better the ends of their institutions, and 'act more conformably to law and justice', the Charter empowered the Supreme Court, as a superior Court to superintend and control the Court of Requests and the Justices of the Peace in such manner and form as the inferior Courts and Magistrates of England were, by law, 'subject to the order and control' of the Court of King's Bench. To achieve this object, the Supreme Court was authorised to issue various Prerogative Writs like the Mandamus[1], Certiorari[2], Procedendo[3], or Error[4].

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1. Mandamus is an order issued by the King's Bench commanding magistrates or others exercising an inferior jurisdiction to discharge a duty. It lies to an inferior court asking it to state a case or to exercise a jurisdiction.

2. Certiorari: This Writ issues to remove a suit from an inferior court to the King's Bench. It may be used before a trial is completed (a) to secure a fairer trial than can be obtained before an inferior court; (b) to prevent an excess of jurisdiction. It is invoked also after trial to quash an order which had been made without jurisdiction or in defiance of the rules of natural justice.

3. Procedendo or Prohibition: The writ is used by the King's Bench primarily to prevent a lower court from exceeding its jurisdiction, or acting contrary to the rules of natural justice, e.g., to restrain the judge from hearing a case in which he is personally interested.

4. The action of error was the ancient method of prosecuting appeals from Judgments of the Courts. The proceedings were initiated by the Writ of Error. It was a very different matter from an appeal as we understand it to-day. It could only be brought when some error was apparent on the record.

The Regulating Act had left it to the Charter to lay down the conditions under which appeals from the decisions of the Supreme Court were to lie to the King in Council. The Charter defined these conditions, as follows :

(a) In civil cases appeals could be made with the permission of the Supreme Court itself. The petition seeking the requisite permission was to be presented to the Supreme Court within six months from the day of its pronouncing the judgment in that particular case. Appeal could lie only if the subject-matter involved in the dispute exceeded one thousand pagodas.

(b) In criminal cases, the Supreme Court was to have full power and absolute discretion to allow or deny the permission to make an appeal to the King in Council from its decision.

(c) Besides, the King in Council reserved the right, as a special case, to refuse or admit an appeal from any judgment, decree or order of the Supreme Court, upon such terms and conditions as they thought fit.

The Charter granted to the Supreme Court a power to reprieve or suspend the execution of any capital sentence. It was thought that there might arise cases wherein it might be proper to remit the general severity of the law in the sphere of criminal justice administered by the Supreme Court. In such cases, if the Supreme Court thought that there was a proper occasion for mercy, then it could suspend the execution of the death sentence, transmit to the King in Council all the relevant record along with the reasons for recommending the criminal to mercy, and await the pleasure of the King.

The Supreme Court was empowered to admit such and so many Advocates and Attornies as it thought proper. Only such persons were to appear and plead before the Court. On reasonable cause, the Court was authorised to remove any of them from the rolls. No other person, except such Advocates and Attornies, were to be allowed to act and plead in the Court.

MERITS OF THE SUPPREME COURT

As an instrument to administer justice, the Supreme Court of Judicature was a great improvement on its predecessor, the Mayor's Court and the Court of Oyer and Terminer and Gaol Delivery existing at Calcutta under the Royal Charter of 1753. This judicial system was extremely unsatisfactory and suffered from many glaring defects. The Mayor's Court had authority to try causes in which the Company itself was a party. But such trials were vitiated by the fact that the Judges who composed the Mayor's Court were removable at the discretion of the Governor and Council, from whose action there lay only the dilatory remedy by way of appeal to the King in Council. The Court of Oyer and Terminer and Gaol Delivery, composed of the functionaries of the Company appointed in Calcutta, was an insufficient deterrent to wrong doing on the part of the Company's officials. The Court of the Governor and the Council was completely ineffective to check the Company's servants from misusing and abusing their position to the detriment to the country. The Judges (or the Aldermen) of the Mayor's Court had generally been junior servants of the Company. These persons were supposed to act under the English Law, of which they were largely ignorant. It was theirs to decide, without any professional knowledge of law, cases affecting the property, the liberty and the lives of the British subjects and their native dependents. With the result that they referred for the advice of the Company's counsel in England before deciding complicated matters of law and all this resulted in great delay. Further, the process of an appeal from that Court to the King in Council was intolerably tedious.

The institution of the Supreme Court was an act of reformation. The Court was to consist of professional lawyers as Judges. They were to be appointed by His Majesty and they were to hold the office during His Majesty's pleasure. The Court was, therefore, free from all the defects which vitiated the previous judicial system. It was in a much better position to take a dispassionate view of the cases in which either the Company or its servants happened to be involved.

Further, the Judges of the Supreme Court were invested with the status, privilege and powers of the Judges of the King's Bench in England. They were thus empowered to issue the Prerogative Writs. In this way, the Supreme Court was a much more effective instrument of justice than the Mayor's Court.

The Supreme Court was to consist of both the Common Law and the Equity jurisdictions. It was thus the first experiment under which the same court was to combine both the functions, of the Court of Common Law and the Court of Equity. In this respect, the Supreme Court can be regarded as an improvement even on the judicial system of England, where the Common Law and the Equity, constituted two separate, distinct and independent jurisdictions. The Supreme Court may even be regarded as the precursor of the Judicature Act of 1873, by which Common Law and Equity came to be administered by one and the same Court in England.

Not only this, the Supreme Court further combined into itself the Admiralty and Ecclesiastical jurisdictions also. In England, all these functions were discharged by distinct courts, thus giving rise to a maze of courts. From this point of view also the Supreme Court may be regarded as the precursor of the Judicature Act of England passed in 1873, when all these various and distinct jurisdictions were combined to be discharged by one Tribunal. What was done in Calcutta in the eighteenth century, was done in England in the 19th century, exactly after one hundred years.

DEFECTS IN THE CONSTITUTION OF THE SUPREME COURT

Consequent upon the establishment of the Supreme Court of Judicature of Calcutta, Bengal witnessed a spell of struggle between the Government, on the one hand, and the Supreme Court, on the other. The relations between the two bodies became severely strained. The development of this unfortunate state of affairs was due to the many ambiguities, defects and vaguenesses existing in the Regulating Act and also the Charter issued under it to create the Court.

There would have been no difficulty had the jurisdiction of the Supreme Court, like that of the Mayor's Court, been confined only within the limits of Calcutta. But many an Englishman, in various capacities, had begun to reside in the interior of the country, and so, it was thought proper, requisite and advisable to extend the jurisdiction of the Supreme Court beyond Calcutta though in a restricted degree and only over specified categories of persons. This gave rise to the difficulties that were experienced later. Partly the complexity of the situation and partly the bad draftsmanship of the Act and the Charter were responsible for the subsequent unfortunate developments.

Theoretically speaking, the Diwani territory of Bengal, Bihar and Orissa was not yet subject to the sovereignty of the English Crown. The Company held these provinces merely as an officer of the Mughal government; the sovereignty over them vested in the Mughal Emperor. But from a practical point of view, it was difficult to demarcate between the functions of the Company vis-a-vis Calcutta, which was regarded as a British colony, and its functions in relation to Bengal, Bihar and Orissa. Many difficulties arose owing to this confusing and perplexing situation. Many obscurities in the Regulating Act and the Charter of the Supreme Court were due to this anomalous status of the provinces of Bengal, Bihar and Orissa with the result that the Act and the Charter *proved to be badly drafted* ; the language used being *very general and loose*. The jurisdiction of the Supreme Court was not defined as meticulously as the situation demanded.

The Supreme Court was given a wide jurisdiction in all matters civil and criminal. The Court was to exercise this jurisdiction over a few specified categories of persons, viz. British subjects, subjects of His Majesty, persons employed by, or being directly or indirectly in the service of the Company or any of His Majesty's subjects, and an Indian inhabitant when he placed himself voluntarily under the Court's jurisdiction in the circumstances detailed above.

Now, it is not clear as to who were the persons intended to be included in the term *British subjects*? Wherein lay the distinction between the 'British subjects' and 'subjects of His Majesty'? In a way, every British subject was a subject of His Majesty also. It may be fairly inferred that the ordinary native inhabitant of Bengal, Bihar and Orissa was not a British subject and so he was not subject to the Court's jurisdiction. Calcutta was regarded as British territory, and, therefore, its inhabitants were regarded as British subjects and also the subjects of His Majesty. The term British subjects was perhaps, used to denote persons who were the natural born subjects of His Majesty. Probably the term British subjects referred rather to the class which later came to be known as the European British subjects. The term His Majesty's subjects, probably, denoted those subjects of His Majesty who were not natural born British subjects like the Canadians, Australians etc. The point however was by no means clear.

The Regulating Act vested in the Governor General and Council, '*the whole civil and military government of the said presidency of Calcutta*' and also the '*ordering, management and government of the territorial acquisitions and revenues of the kingdom of Bengal, Bihar and Orissa.* The management and government of these territories was to be in 'the like manner to all intents and purposes whatsoever as it had been hitherto exercised. The Supreme Court, on the other hand, was to enjoy 'full power and authority to hear and determine all complaints whatsoever against any of His Majesty's subjects for any crime, misdemeanour or oppression and also to entertain, hear and determine any suit or action whatsoever against any of His Majesty's subjects in Bengal, Bihar and Orissa.'

Now, the Act sought to draw a line of demarcation between the Company's administration of Calcutta and its administration of Bengal, Bihar and Orissa. If Bengal, Bihar and Orissa were not regarded as British territory, then the Supreme Court, being a British Court, ought not to have any functions or jurisdiction to discharge in that area. But the provisions of the Charter and the Regulating Act made it clear

beyond the shadow of doubt that the Supreme Court could exercise jurisdiction within that area over some specified persons. It was a contradiction in terms. Not to regard Bengal, Bihar and Orissa as British territory and then to allow the Supreme Court's writs, drawn under the authority and in the name of the King of England, to run in that area was a great anomaly, which created confusion and doubts.

Further, the Regulating Act failed to make clear beyond doubt whether or not the Company, in its Diwani capacity, was subject to the jurisdiction of the Supreme Court. The Company was vested with the supreme administrative and military authority in relation to those provinces. The Court, on the other hand, was vested with the supreme judicial authority. *Was or was not the Company, in relation to its actions as Diwan, subject to the jurisdiction of the Court?* Could its actions, executed in that capacity, be called into question in the Court? These were some of the questions which were left unanswered, or rather vaguely answered, by the Act and the Charter.

It was the contention of the Company and its representatives at Calcutta that the Supreme Court could not call into question any of the activities of the Company in its capacity of Diwan. For many valid reasons, the Supreme Court could not have accepted this contention of the Company. The Regulating Act and the Charter had not made any reservation in this behalf. Further, the contention of the Company, in effect, meant complete immunity for those of its servants who were engaged in the discharge of the Company's Diwani functions. It was a very notorious fact that the worst of oppressions were committed by the servants of the Company in the sphere of collection of revenue. *The Supreme Court was avowedly instituted with an idea to prevent the servants of the Company, employed in the collection of revenues, from indulging in corrupt and oppressive practices.* There were many express provisions which showed that the Act sought to establish an impartial court control over the vagaries and

excesses of the Company's servants. The Charter had extended the jurisdiction, civil and criminal, of the Court over those persons who were employed by, or were directly or indirectly, in the service of the Company. These were express provisions and so the Court was entitled to take cognisance of all civil and criminal cases in which the servants of the Company were involved either in their private or public capacities. Bitterly as this was resented, the rights of the Court in this direction were very clear and specific. The Parliament had established the Supreme Court as an instrument to terrorise the servants of the Company in Bengal and to inspire into their hearts an awe, so that they might keep themselves in a straight path. The acceptance by the Court of the Company's contention to hold itself free and immune from the Court's jurisdiction, in its character of Diwan would have frustrated all the ideas and motives with which the Court was created in reality. Evidently, this gave rise to a series of disputes between the Court and the Government, to which the Court's jurisdiction on this score was extremely embarrassing, inconvenient and obnoxious.

But then, what were the limits to which the Court could interfere with the work of collection of revenue and the functioning of the Company's servants in this sphere. The English Law itself was very uncertain on the point. In 1774, the whole matter was very obscure and indefinite. A liberal interpretation by the Court of its role in this respect might have meant a complete breakdown and collapse of the administrative fabric in the Diwani lands, because the system had not yet been solidly founded and which, by all standards, was in an extremely nebulous and primitive stage. The whole position was so vague that even the most conscientious of men would have entered upon office as revenue collector with a lively apprehension of being ruined by litigation commenced by irresponsible persons, who would have nothing to lose by going to law and possibly, should technicalities favour them, much to gain. As was inevitable on this matter the Council and Court at once came into collision, the former holding that the

Act exempted its officers from the jurisdiction of the Court in respect of acts done by them in the collection of the revenue, while the latter maintained that the duty of hearing cases in which the revenue officers were complained against on the score of illegal acts was precisely one of the most important purposes for which the Supreme Court had been created. Here, as will be seen, was afforded an opportunity for a violent quarrel between the executive and the judicial powers.'[1]

The jurisdiction of the Supreme Court extended over all those persons who were employed by the Company, or were in its service 'directly or indirectly.' What actually was the meaning of the term 'employment' or 'service', was not very clear. Did it cover the Indian zemindars, farmers of revenue, who were responsible for the collection of revenue on a kind of a commission basis ? The point was far from being clear. The Council contended that not only the collectors of revenue, but even the zemindars and farmers were immune from the Court's jurisdiction. The Court, on the other hand, took a different view of the matter. It decided that the collectors of revenue were subject to its jurisdiction. It also decided that the farmers of revenue were also liable to its jurisdiction, as they were indirectly in the service of the Company. The question of the zemindar's liability never directly arose and so was not specifically decided by the Court.

With the passage of the Regulating Act, there came in to existence two distinct and independent judicial systems in Bengal.

In 1772, Warren Hastings created an Adalat System in the mofussil of Bengal, Bihar and Orissa beyond Calcutta. This System, modified in 1774, and known as the Company's judicial system, was self-sufficient in itself, having a hierarchy of courts culminating in the Sadar Diwani Adalat at Calcutta.[2] The

1 Firminger, 1, cclix.

2. Sadar Nizamat Adalat, may be left out of account for this purpose for the present. It became a Company's Court, in its true sense only after Cornwallis's reforms of 1790.

Regulating Act and the Charter, on the other hand, created in Calcutta a King's Court, consisting of the King's Judges, under the name and style of the Supreme Court of Judicature. The Regulating Act did not specify as to what would be the relation between the two systems, the Crown's and the Company's. Certainly, it was not the intention of the Parliament to supersede or to trespass upon the Company's judicature or to bring under the Supreme Court's authority the bulk of the native inhabitants of Bengal, Bihar and Orissa. The Regulating Act and the Charter were completely silent on this point. It was very necessary for the Act and the Charter to contain some carefully drawn clauses safeguarding the jurisdictions of the Company's Adalats, which it was no intention of the framers of the Act to invade. *The absence of any such safeguard in favour of the Company's Judiciary gave rise to certain complications.*

The Company's Judiciary continued to function, as usual, after the establishment of the Supreme Court. It was not clear whether the Supreme Court could or could not take into cognisance any matter against the Judges of the Company's Courts for any act of illegality or corruption committed by them in the discharge of their judicial functions. The question of boundaries between the two systems was left unsolved. Now, the Supreme Court of Judicature had a general jurisdiction over the servants of the Company in Bengal, Bihar and Orissa. Were not the Judges in the Company's Courts servants of the Company? Did not they fall under the Supreme Court's jurisdiction? Then, there were the native law officers, Kazis and Pandits, who used to expound the Mohammedan Law and the Hindu Law in the Company's Courts, and as servants of the Company they also came under the Supreme Court's jurisdiction. The Supreme Court, therefore, took the view that *it could try actions against the judicial officers of the Company for acts done in the execution of their public functions.* The Supreme Court claimed power to penalize the judicial officers of the Company for any wrongs or irregularities committed by them in the execution

of their office. This, naturally, the Council did not like and thus, there arose disaffection between the Council and the Supreme Court. The dispute on the point culminated in the famous *Patna Cause.*

The Regulating Act thus created in India two independent and rival judicial systems, one deriving its authority from the British Crown and Parliament, the other, from the Company as the Diwan of the Moghul Emperor, and the interrelations between the two were not clearly defined.

Beyond Calcutta, the Supreme Court was to exercise jurisdiction over only a few specified categories of persons. If then, a case was brought in the Court against some one, how was it to be proved whether he was under its jurisdiction or not? How was the Court to know whether the person against whom the action was filed, fell or not within any of the categories over whom it had jurisdiction? The point was full of difficulties. The Supreme Court took the view that when an action was brought against a person, he should appear before it and plead to its jurisdiction, and then only the Court could decide whether his objection was valid or invalid. If the Court upheld his plea of being exempt from its jurisdiction, no further action was to be taken against him in the matter.

This meant that every Indian inhabitant of Bengal, Bihar and Orissa was subject to the Court's jurisdiction to the extent of his appearing before the Court and pleading to its jurisdiction if ever a case was brought and a writ served on him. The claim of the Court that a person alleging that he was not subject to its jurisdiction must plead accordingly, though tenable in itself, was in practice very inconvenient to the Indians residing in the interior of the country. To them the Supreme Court was a foreign institution, speaking a foreign language, applying a foreign system of law and using a procedure which they did not comprehend. The proceedings of the Court were very costly. Every person, even though he had to take the preliminary

objection only, had to employ an English barrister at a heavy cost. Besides, the long distances he had to travel from his residence to Calcutta, and his sojourn there till his plea was decided, caused him much trouble and inconvenience.

Difficulties for the Indians did not, however, stop with this. The Supreme Court was completely out of harmony with their mode of life, traditions and manners. Its procedure was a very technical affair, it being based on the ordinary English procedure in civil actions at Common Law. One very objectionable and embarrassing feature of this procedure was, what was known as *'Arrest on Mesne Process.'* If A brought a suit or a civil cause against B, the Court would issue a writ calling on B to appear before it. Even though B might not be within the Court's jurisdiction, yet he had to appear to take the initial plea. To ensure B's appearance before the Court, the writ, called the *Writ of Capias*, used to be issued which was not an ordinary summons but a warrant to arrest B. After his arrest, B would be kept in confinement till his case was finally disposed of, and this might take many months. The only way out of this predicament for B was to enter into a bail, but its amount was usually fixed at a very high figure which was beyond the means of B to furnish, and so B had to remain in confinement compulsorily till his plea was heard and disposed of by the Court. If the Supreme Court came to the conclusion that B was not under the Court's jurisdiction, he would be released, no further action being taken against him. But B could not be happy at this prospect of his release, for during the period he was in confinement he had already suffered much in health, wealth and reputation. Indians were not accustomed to such a procedure and to them the Supreme Court appeared to be an instrument of oppression and tyranny. 'The *law of arrest on mesne process* was beyond all question one of the worst and the most oppressive points of the law of England as it stood, down almost to our own times. Its introduction into India was indefensible.'[1]

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1. Stephen's, Story of Nuncomar and the Impeachment of Impey, II, 145.

The Regulating Act left wholly untouched the question of the nature of the law to be administered in the Supreme Court. The Supreme Court had been created on the foundations of the Mayor's Court, which was a court of English Law. It followed, therefore, that the Supreme Court was also to administer English Law—'the unregenerate English law, insular, technical, formless, tempered in its application to English circumstances by the quibbles of judges and the obstinacy of juries, capable of being an instrument of the most monstrous injustice when administered in an atmosphere different from that in which it had grown.[1]'

Further, it could not be the whole of the English Law which the Court was to apply, but only those portions of it *which suited the Indian conditions.* This introduced another element of uncertainty. No body could be sure whether a particular rule of English Law was applicable to the Presidency or not, until and unless the matter came before the Court for its decision on the suitability of the rule to the Indian conditions.

Confusion about the law to be administered by the Supreme Court did not end here. According to the theory of the English Constitutional Law, English Law was introduced into Calcutta, and so also in Madras and Bombay, in the year 1726 when the Royal Charter created a Mayor's Court in each of the presidencies. The Mayor's Court was to be a Court of English Law. In this way the English Law existing in England in the year 1726, so far as it was suitable to the Indian conditions, was made applicable to the presidency towns. The Charter of 1726 gave place to the Charter of 1753, and the latter, so far as it applied to Calcutta, gave place to the Charter of 1774, which created the Supreme Court of Judicature. What was left undecided was whether the subsequent Charters could be regarded as substantive reintroductions of the English Law up to their dates? The Regulating Act and the Charter had left the point untouched. Every thing was shrouded in confusion and

1. Ilbert, Government of India, 54,

doubt. The specific rule of law applicable to a particular contingency was thus very hard to ascertain.

The Mayor's Court of 1753, ordinarily, was not to undertake to decide civil causes arising among the natives, except when submitted to it voluntarily by both the parties. The Supreme Court, on the other hand, was to have jurisdiction to decide such cases arising among the native inhabitants of Calcutta. It was not certain as to what law the Supreme Court would apply in such cases. Were the natives to be subject to the English Law or to the respective personal law? Then again, the servants of the Company were also placed under the Court's jurisdiction. Many of them were Indians, and the question of the law applicable to them was also left unsettled.

The Supreme Court also administered English Criminal Law, which, at the time, to say the least, was barbarous. It would not be an exaggeration to call it as the 'hanging law'. A large number of offences under it was punishable with death. All this criminal law—technical, cumbrous and severe—was to be applied by the Supreme Court by its own technical procedure. Many Indians, either as inhabitants of Calcutta or servants of the Company, were subject to this law which was very oppressive for them. They did not know anything about this law as it was never formally promulgated in Calcutta. They did not like it as it was completely foreign to their conceptions, traditions and manners.

The provisions of the Regulating Act regarding the relation that was to exist between the Supreme Court and the Bengal Government were obscure and defective. Could the Supreme Court take cognisance of the acts done in the execution of their office by the Governor General and the members of the Council? Were the Members of the Government answerable individually for such acts in the Court? The answers to these questions were not clear. The Act had made the Supreme Court incompetent to hear or determine any indictment or information against the Governor General or any of his Council for any offence, not being treason or

felony, alleged to have been committed in Bengal, Bihar, or Orissa. Did this mean that the Supreme Court could try the Governor General and the Members of the Council for treason or felony? Further, the Act declared that the Governor General and Members of the Council were not liable to be arrested or imprisoned in any action, suit or proceeding in the Supreme Court. This saving appears to be limited to civil proceedings. Besides these provisions, there was nothing else to exempt the Governor General and Council from the jurisdiction of the Supreme Court for acts done by them in the discharge of their official duties. These Gentlemen, both as the British subjects, and also as being employed by or being in the service of the East India Company, were subject to the jurisdiction of the Court. The Act or the Charter made no distinction between what were called 'the corporate acts, or the acts of the government' and the acts done by them as individuals, and they appeared to be equally amenable to the King's laws for both. They were not expressly exempted from the Court's jurisdiction for their actions, though their persons were privileged from arrest. The Governor General and Council, however, were of the opinion that the Supreme Court could not take cognisance of their actions done by them in their public capacity. The Regulating Act left untouched the question as to how far the Court could question and determine the legality of the orders of the Governor General and Council. How far a person acting under their orders was exempted from the Court's jurisdiction?

For seven years following the inauguration of the Supreme Court there arose a host of difficulties in Bengal, Bihar and Orissa. The relations between the Court and the Council practically reached the breaking point. The causes of conflct, in truth, were inherent in the system established by the Regulating Act. Its obscure language contributed much in this direction.

In the controversies which followed there were three

main heads of difference between the Supreme Court and the Supreme Council.

These were, first, the claims of the Court to exercise jurisdiction over the English and the Indian officers of the Company employed in the collection of revenues and to punish them for corrupt or oppressive acts done by them in their official capacity in the collection of revenue.

The second question was as to the right of the Supreme Court to try actions against the judicial officers of the Company for acts done by them in the execution of their official duties. This question came to a head in the famous *Patna Case.*

The third question was as to the claims of the Supreme Court that any person, residing in Bengal, Bihar and Orissa beyond Calcutta, and alleging that he was not subject to the Court's jurisdiction must appear before it and plead accordingly. The Court claimed an opportunity of being in the position of adjudicating on this issue after hearing relevant evidence and arguments. The Court thus claimed to exercise jurisdiction over the whole native population, to the extent of making them plead to the jurisdiction, if a writ was served on them. The quarrel on this point culminated in what was known as *the Cossijurah case.*

THE TRIAL OF NAND KUMAR

The Trial of Nand Kumar is a conspicuous example to denote the anomalous character of the Supreme Court in so far as it exercised jurisdiction over the Indians.

The Supreme Court of Judicature was designed as an instrument to afford protection to the natives of Bengal, Bihar and Orissa against the oppressions and extortions of the servants of the Company, in which they had been indulging with impunity since the grant of the Diwani. Even though it was to act as the saviour of the Indians, the Supreme Court was not an unmixed blessing to them. A large number of natives, as residents of Calcutta and also as servants of the

Company, had been subjected to the Court's jurisdiction, which was very hard for them. The constitution, jurisdiction, powers, law and language of the Court were all foreign to them. Its proceedings were very costly. The law applied by it was unknown to them and was completely out of harmony with their culture and traditions.

Raja Nandkumar brought certain charges of corruption and bribery against Warren Hastings before the Supreme Council. After a few days he was tried by the Supreme Court of Judicature on a charge of forgery brought against him by an Indian, Mohun Pershad. The Court found him guilty of the offence of forgery and sentenced him to death under an Act of the British Parliament enacted in the year 1728. The sentence of death was duly executed.

Since the day of his trial, doubts have often been expressed that Nandkumar was the victim of Warren Hastings's rage, that he was tried ostensibly for forgery but really for his courage to bring charges against Hastings and that the Supreme Court acted as a willing tool to gratify and oblige the Governor General on this score. Impey, the Chief Justice of the Supreme Court, was a very good friend of Hastings. Macaulay, Mill and a host of other historians have, in no uncertain terms, accused Impey of having conspired with Hastings to put Nandkumar out of Hastings way as he had made himself obnoxious to him by bringing charges against him in the Council. Impey was later on impeached, and the trial of Nandkumar formed one of the charges laid against him ; but after some trial, this impeachment was abandoned.

The charge of conspiracy against Impey is based only on the sequence of events and not on any direct evidence, oral or documentary. There is some difficulty in accepting the proposition that there was any conspiracy between Impey and Hastings against Nandkumar. He was tried not only by Impey, but by the whole Court consisting of four Judges. There was a Jury of twelve Englishmen. He was unanimously held guilty by all the Judges and also by the Jury.

But apart from this, there were certain incidents in the case which raised strong doubts in the minds of the people about the *bona fides* of the Court in this matter. In the first place, every Judge of the Court cross-examined the defence witnesses and under this methodical and severe cross-examination, the whole of the defence collapsed. In the second place, after the conviction of Nandkumar, an application for granting leave to appeal to the King in Council was moved in the Supreme Court, but it was rejected. Further, the Charter of 1774 had vested in the Court an authority to reprieve and suspend the execution of a capital sentence and recommend the case for mercy to His Majesty. The Court did not exercise this power in Nandkumar's favour. There could not have been a stronger case than that of Nandkumar for the Court to exercise its power to respite the sentence and submit the record to the King. The offence for which Nandkumar was convicted, had been committed by him five years previously, much before the establishment of the Supreme Court itself. The Statute under which Nandkumar was sentenced to death for forgery was passed in England in 1728 and it had a special reference to the peculiar circumstances prevailing there. The provisions of the Law on the point had never been made known in Calcutta as the Act of 1728 had never been promulgated there. Neither by the Hindu Law nor by the Muslim Law had forgery been ever regarded as a capital crime. The Supreme Court, therefore, ought to have respited the execution of the death sentence on Nandkumar pending the consideration of his case by the King in Council. To sentence an Indian to death under these circumstances, by applying literally a rule of English Law, was unjust in the extreme and nothing short of miscarriage of justice. The institution of the Supreme Court was wholly repugnant to the Indian people and was ludicrously unsuited to their social conditions and environments.

The trial and execution of Nandkumar shocked the Indians rudely. The Court went down in their estimation. They were apprehensive of the Court as they did not know as to when, under the mysterious provisions of the English Law, they might become liable to be punished. It took the

Court sometime to rehabilitate itself in the esteem of the people of Bengal, Bihar and Orissa.

The Trial of Nandkumar throws interesting light on the early notions entertained by the Supreme Court on the important point regarding the application of the English Law to Calcutta. In the view of the Court, the Statute of 1728 was applicable to Calcutta. Now, the applicability of a particular English Statute to the presidency town depended on two factors. Firstly, whether or not it was suitable to the conditions prevailing there. The Charter had specified that the Supreme Court was to administer criminal justice in such and like manner as the Justices of Oyer and Terminer and Gaol Delivery did in England or 'as near thereto as the circumstances and conditions of persons and places would admit of.' It was thus not the whole of the English criminal law that was made applicable to Calcutta under the Charter but only those portions of it which were suitable to its conditions. The question, therefore, was whether the Statute of 1728 which made forgery a capital offence in England was suitable to the circumstances of Calcutta at the time. On this point the Supreme Court took evidence, heard arguments and then finally came to the conclusion that the town of Calcutta enjoyed a great commercial importance and that the same conditions which existed in England and which induced the Parliament to enact the Law in 1728 existed in Calcutta also. The Court held that the Statute, was suitable to the conditions of Calcutta.

Secondly, the applicability of the Statute of 1728 depended on the question of the date on which the English Law might be regarded as having been introduced into Calcutta. The Charter of 1726 created a Crown's Court at Calcutta in the form of the Mayor's Court. It was a Court of English Law and so it was in 1726 that the Common Law of England, both civil and criminal, along with the statutory law of England became applicable to Calcutta. Subsequently, two other Charters, in 1753 and 1774, were issued by the Crown. Did these Charters also introduce English Law in Calcutta? The

Supreme Court did not specifically decide this point in the Case of Nandkumar. The defence in that Case did not raise this point, and, perhaps, it was regarded as common ground that the subsequent Charters also had introduced English Law in Calcutta. No one appears to have entertained any doubt on this point. The Supreme Court acted on that supposition, and thinking the Statute to be applicable, sentenced Nandkumar to death. To-day, however, the position is very much different. No English Statute passed after 1726, unless expressly made so, is now considered as being applicable to any of the presidency towns. The English Law is regarded as having been introduced finally in 1726 and not thereafter. According to the modern view, the Act of 1728, under which Nandkumar was tried and sentenced, was never introduced into Calcutta, and so the whole trial was illegal. But, as already pointed out, the Supreme Court at the time assumed that the Letters Patent of 1774 had re-introduced English Law in Calcutta and that the Statute of 1728 was applicable there. This view was given up only subsequently. It is very difficult to say as to when the new rule arose, though it is now well settled by a long series of cases. No English Statute passed after 1726 is regarded as being applicable to Calcutta unless it was expressly made so. All the English Statutes enacted prior to that date are regarded as having been introduced there in so far as they are suitable to the conditions prevailing there.[1]

THE PATNA CAUSE

The years 1777, 78 and 1779 witnessed an important event in what is known as the Patna Cause. It attracted great public attention. The part played in the matter by the Supreme Court came in for a lot of criticism and adverse

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1. The same is the position of Bombay and Madras presidency towns. There also the material introduction of English Law is regarded to have taken place in 1726 and not thereafter. For case law on the point: Advocate General of Bengal vs. Ranee Surnomoyee Dassee, 9 M.I.A. 387 at p. 426. See also, Sm. Bhooney Money Dossee vs. Natobar Biswas, (1901), 5 C.W.N. 659 at pp. 662 and 663 (Harrington J.) The leading authority on the point is the old case, Calvin's Case, 7 Rep. 1, or, 77 Eng. Rep. 377.

comment in subsequent years. The case generated strong feelings and deep resentment in the Government camp. But, nevertheless, it revealed the weaknesses and the radical defects existing in the methods of administration of justice by the Company's Courts in the mofussil.

The facts of the Case were as follows :

P
Patna
case

Shahbaz Beg Khan, a native of Kabul, came to India, became a soldier in the Company's army and gathered a considerable fortune. His wife was Nadirah Begum. They had no issue. Consequently, Shahbaz called his nephew, Bahadur Beg, from Kabul to live with him. He expressed a desire to adopt Bahadur Beg, to hand over property to him and retire from the world. But before this project could be fulfilled, Shahbaz died in 1776.

Thereafter, a struggle for property ensued between Bahadur Beg, on the one hand, and Naderah Begum, on the other. Each of them claimed the whole of the estate of the deceased. The Begum claimed the property on the ground that her deceased husband had made a gift of the whole property to her, and she produced relevant documents to substantiate her claims. Bahadur Beg, on the other hand, claimed the property as the adopted son of the deceased. As the matter could not be settled amicably between them, Bahadur Beg filed a suit against the Begum in the Company's Diwani Adalat at Patna. It may be noted that the Judicial Plan of 1774 was in operation at the time. Under this system, justice at Patna was administered by the Provincial Council, composed of the English servants of the Company. The Provincial Council did not act merely as the Civil Court for Patna, but also acted as the agency to supervise the collection of revenue in the Division. In the discharge of their judicial functions, the English servants in the Provincial Council were assisted by the native Law Officers, Kazis or Pandits, who would expound the respective law.

According to the Regulations promulgated in 1774, the function of the native Law Officers was merely to expound

the law after all the relevant facts had been decided by the Court on the basis of the evidence produced before it by the parties to the dispute. The function of the native Law Officers was not to decide the questions of fact ; they had no more function but to advise the Judge in the Diwani Adalat as to the law applicable to the facts as decided by the Court. But the usual practice prevalent in the Adalats was very much different. The English Judges, being ignorant of the Indian laws and customs, found it onerous to dispense justice in person. Moreover, they were very busy in the more interesting work of collection of revenue and had very little inclination or leisure to discharge judicial functions. They, therefore, used to remit the whole case to the Native Law Officers for investigation. The case was considered by them, evidence taken and facts decided, and after all that, they used to make their report to the Court, which it confirmed as a matter of course. In this way, the whole business of administration of justice had been left by English Judges in the hands of native Law Officers-Pandits or Kazis-according to the nature of the particular case.

In pursuance of this practice, the Patna Council (or the Adalat) remitted the case of Bahadur Beg to the Kazis. They were required :

(i) To make an inventory of the property of the deceased ;

(ii) To collect the property and seal it ;

(iii) To report to the Council as to the *rights* of the parties ; 'That according to *ascertained facts* and legal justice' they were to transmit to the Council a written report specifying the shares of the parties.

Under the prevailing Regulations, the Law Officers could only be entrusted with half of the third item i.e., to decide shares according to legal justice. It was not theirs to decide the facts as directed by the Council in the first half of the item number 3 above. Similarly, the tasks of making inventory and collecting property were not within their purview.

However, the Kazi and the Muftis proceeded with the work thus allotted to them by the Patna Council. While collecting property at the house of the deceased, they treated the Begum with disrespect and violence. Thereupon, the Begum left the house and went to live in a Dargah.

The Officers took evidence to ascertain facts. The process adopted by them for this purpose was extremely irregular and informal. No oath was administered to any witness. Many witnesses did not appear before the officers in person. Chits with questions were sent to them through messengers who brought back the answers on the same chits. On the basis of evidence recorded in this way, the Kazi and the Muftis came to the conclusion that the deeds produced by the Begum in support of her plea that the property had been gifted to her by her husband, were all forged and so invalid. The property was distributed according to the Mohammedan Law. One fourth of the property was allotted to the Begum; three fourths, to Shahbaz's brother (Bahadur Beg's father), who was the other heir of the deceased.

Their decision shows that the Kazi and Muftis had an adequate knowledge of the Mohammedan Law and thus were quite competent to discharge the function of expounding and applying the principles of the Mohammedan Law. With respect to the facts ascertained by them, their decision demarcating the respective shares was substantially in accordance with the Muslim Law of Inheritance. Bahadur Beg was not an heir in his own right for the Mohammedan Law did not recognise anything like adoption. His father, who was at Kabul, and the Widow of the deceased, were the true heirs. As Bahadur's father was away and he could not look after his property, the Officers entrusted that part of the property to Bahadur Beg, his son and representative in India. Apart from their applying the Law, the proceedings in the Patna Cause showed also that the Law Officers were hardly competent for the job of ascertaining facts. Their methods of recording evidence were much too much informal.

As usual, the Provincial Council accepted the report of

the Kazi and Muftis, and ordered a division of the property to be made accordingly. The Begum being dissatisfied with this verdict, refused to accept the fourth share. She filed an appeal against the decision in the Sadar Diwani Adalat at Calcutta. This Court was composed of the Governor General and Council. Its methods and proceedings were hardly more regular than those of the lower courts. The Governor General and Council being busy with other state business did not find requisite time to discharge their obligations as the Judges of the Sadar Diwani Adalat, whose sittings were thus very irregular. The Begum waited for some time but the Sadar Adalat did not take any action in the matter. Ultimately, she brought an action before the Supreme Court of Judicature against Bahadur Beg, the Kazi and Muftis. Her grounds of complaint were the various personal indignities shown to her by these persons. Her action was for assault, battery, false imprisonment, breaking and entering her house and carrying away her property etc. She claimed damages amounting to six lacs of rupees.

According to its usual procedure, the Supreme Court issued a Writ of Capias on the defendants, which meant a warrant of their arrest, liable to be released on furnishing bail. All the defendants, Bahadur Beg, the Kazi and the Muftis were arrested and brought to Calcutta from Patna. As they were unable to furnish the necessary bail, they were lodged in the Jail pending the trial and decision of the action brought against them by the Begum.

There was no difficulty about the Court's jurisdiction over the Kazi and Muftis. They being the servants of the Company undoubtedly fell under it. In what sense was Bahadur Beg subject to the jurisdiction of the Supreme Court? This was a question of real importance. It was proved that Bahadur Beg was *a farmer of land revenue of certain villages in Bihar*, and the Court, therefore, determined that he was '*a subject of the jurisdiction of this Court, as being directly or indirectly in the service of the East India Company.*' The farmer of land revenue used to stipulate with the Government

to pay a fixed sum as revenue, and indemnified himself for his trouble by the surplus which he was able to collect from those whom he leased the land. A farmer being thus employed in the raising of revenue for the Company, was in its indirect service and so was a proper object of the Supreme Court's jurisdiction.

The Kazi and the Muftis pleaded that the Provincial Council of Revenue at Patna was an acknowledged Court of Judicature and that it was the established custom of the Provincial Council to refer cases in which Mohammedans were parties, and in which the Mohammedan Law would apply, to the Kazi and Muftis, who would hear evidence on both sides and make a report to the Council. It was asserted on their behalf that the execution of any intermediate process in any such case was also entrusted to the Kazi and Muftis and likewise the execution of the decree or judgment of the Council in the suit. In the matter in question, the parties were Mohammedans and all the acts complained of by the Begum were acts done by the Kazi and Muftis, in accordance with the established practice, in the discharge of their duty as the regular Law Officers of the Council.

The Supreme Court cast off this plea. The Court unanimously held that the proceedings of the Law Officers were *illegal and unwarrantable*. The grounds for this decision were :

(i) The power to administer justice was vested in the Council at Patna.

(ii) That this Court had not performed any judicial act itself, but had left the determination of the whole cause to the Kazi and Muftis.

(iii) The Governor and Council had entrusted the judicial power to the Court and not to the Law Officers. But according to the practice, the law officers and not the Court exercised the judicial power.

(iv) There would have been no objection had the questions of law arising upon the facts been advised upon

by the Law Officers. But the Council could not *delegate* to its Law Officers the hearing of the suit, and to give a decision upon the basis of a mere report.

Thereafter, the Supreme Court went into the actual merits of the case. It came to the conclusion that the Begum had been treated harshly by the Law Officers, that they had treated her as a proper object of 'rapine and plunder,' and that the claim of the Begum to the whole of the property of her deceased husband was well founded as the documents on which she relied, and which had been declared to be forgeries by the Law Officers, were valid and genuine. The Supreme Court pronounced the judgment: 'The damages altogether, for taking away the property, and for the personal injuries, we estimate at *three lacs of rupees;* therefore let there be judgment for the plaintiff, with damages to that amount with costs.'

The defendants-Bahadur Beg, the Kazi and the Muftis-being unable to pay such huge damages, were lodged in the jail.

The Supreme Court has often been criticised for its role in the Patna Cause on the ground that it took cognisance of acts done by the judicial officers of the Company in the discharge of their public functions. The view point of the Court, however, was different. The proceedings of the Kazi and Muftis were irregular and unwarranted by the Regulations. Every thing thus done by them was illegal. The Patna Cause betrayed in the most telling manner the essential weaknesses of the judicial machinery of the Company. The state of affairs prevailing in those Courts was extremely discreditable and unsatisfactory. Even Warren Hastings commented adversely on the way the Patna Provincial Council had discharged its judicial functions. 'I cannot but take notice', wrote Hastings, 'of the irregularity in the proceeding of the law officers, whose business was solely to have declared the laws. The Diwani Court was to judge of the facts; their (i. e., the law officers) taking on themselves to examine witnesses was entirely foreign to their duty; they should have been examined before the Adalat.' The Supreme Court had thus tried the

judicial officers, not for what they had done in the discharge of their regular functions, but for something which was extraneous to their office.

The Patna Cause established that the Provincial Council of Patna had practically reduced itself to a mere nominal body and that it had entrusted the entire judicial work to the native Law Officers. This practice was inconsistent with the Regulations.

The Patna Cause also revealed that the working of the Sadar Diwani Adalat was very irregular. It became clear beyond the shadow of a doubt that the Company's judicial system was in need of immediate radical reforms. The Courts of the Company needed to be put on an entirely new basis if they were to discharge their functions efficiently and effectively.

No doubt, all that happened under the Patna Cause was very obnoxious to the Company and its representatives at Calcutta. The one sad effect of the Case, however, was that it demoralised all those who were engaged in the administration of justice in the Courts of the Company.] ad of Patna Case

THE COSSIJURAH CASE

The quarrels and contentions between the Supreme Council and the Supreme Court were *finally* brought to a crisis by the events connected with, what was known as the Cossijurah Case.

Cossinaut Baboo advanced on loan a large sum of money to the Zemindar of Cossijurah. The money remained unpaid for long. Cossinaut, therefore, brought a suit in the Supreme Court against the said Zemindar on August 13th, 1779. He stated that the Zemindar was employed in the collection of the revenue.

As usual, the Supreme Court started with issuing a Writ of Capias warranting the arrest of the Zemindar, from which he could save himself only by offering a bail of three lacs of

rupees. The Zemindar, on the other hand, concealed himself in order to avoid service of the writ, and thus saved himself from arrest. The Writ of Capias returned to the Court unexecuted.

In the meantime, the Collector of Midnapur, within whose jurisdiction the zemindary of Cossijurah lay, informed the Governor General about this development, and stated that the Zemindar was concealing himself to the detriment of the revenue which, otherwise, he ought to have been collecting. The Governor General referred the matter to the Advocate General for his opinion.

The Advocate General in his report stated that the Regulating Act did not seek to extend the jurisdiction of the Supreme Court to the zemindars of Bengal, Bihar and Orissa. He, therefore, advised the Governor General that the Zemindar of Cossijurah be given a notice that, not being subject to the jurisdiction of the Supreme Court, he should not appear, plead or do or suffer any act which might amount on his part to a recognition of the authority of the judicature as extending to himself. The Governor General and Council informed the Zemindar of Cossijurah that he should not do anything which might give countenance to the Court's authority extending to him. They also published a general notification to all the landholders informing them that they were subject to the jurisdiction of the Supreme Court only if they were servants of the Company or had subjected themselves to it by their own consent. If they did not fall into any of the classes i.e. if they were neither servants of the Company nor persons who by their own consent had submitted to the jurisdiction of the Supreme Court, they were not subject to that jurisdiction, and that they should therefore pay no attention to the Court's process.

The writ of capias having returned unexecuted, the Supreme Court, in order to compel the personal appearance of the said Zemindar, issued another writ to sequester his property. To execute this writ of sequestration, the Sheriff of the Court collected a small force and despatched it to Cossijurah.

The Governor General and Council on being informed of these developments, also despatched a small force to Cossijurah. The Governor General and Council's party apprehended the Court's party and brought ti to Calcutta.

In this way, the Case of Cossijurah led to an exhibition of force and violence on the part of the Government against the Supreme Court.

The next step was taken by Cossinaut Baboo; he brought an action for trespass against the Governor General and members of the Council individually. At first the Governor General and his colleagues entered their appearance. But when they found that they were being sued for acts done by them in their public capacity, they all caused their counsel to make a declaration in the Court that they withdrew their appearances, and that they would not submit to any process which the Court might issue against them.

In this way, the two organs of the State, the Judiciary and the Executive, were up in arms against each other.

On the basis of this case, it has often been suggested that the Council interfered with the Court because the Supreme Court had asserted an unwarranted jurisdiction over the zemindars, as they were not under the Court's jurisdiction under the terms of the Charter and the Regulating Act. But this is incorrect. This impression is the result of a misreading and mis-interpretation of the Court's stand. *The Supreme Court never held that the zemindars as such were in the Company's employment and so subject to its jurisdiction.* The issues in the Cossijurah Case were very different. As already explained[1], when a person filed a suit in the Supreme Court and presented an affidavit to show that the person complained of was subject to its jurisdiction, the Supreme Court used to issue a Writ of Capias to force his appearance. On appearance

1. See page 92.

before the Court, he could plead to its jurisdiction. No further action was taken if the Court accepted this plea. In pursuance of this practice, the Raja of Cossijurah ought to have appeared before the Court in response to the Capias and then he could have pleaded to its jurisdiction. The method, no doubt, was inconvenient for the Indians. But that was the practice, and there was no occasion for the Government to resort to violence on this point.

The Court could exercise jurisdiction beyond Calcutta on a few specified categories of persons only. In case of a dispute, who was to decide whether a particular person against whom a complaint or suit had been filed in the Supreme Court, was or was not within any of these categories? Evidently, this could properly be done by the Court itself, and this the Court could do only when the person appeared before it and placed all the relevant facts and circumstances enabling the Court to decide the question of his amenability to its jurisdiction. In the absence of such a procedure the Court would not have been able to function effectively. The practical result of the notification published by the Government to the zemindars, in effect, was to give them the liberty to decide for themselves whether they were employed by the Company or had placed themselves voluntarily under the Court's jurisdiction and thus to decide for themselves whether they were subject to the Court's jurisdiction or not. This was an untenable proposition and it virtually amounted to screening the zemindars from the Court. In the contest leading to the Cossijurah Case there was no question of the Court's exceeding its jurisdiction, and such an allegation against the Court is unfounded. Sir James Stephen had given the crux of the Cossijurah Case thus: 'The real ground of quarrel between the Court and the Council went far deeper than any of the topics of grievance on which so much has been said. The Court held, as they could not but hold, that every one in Bengal, Bihar and Orissa was subject to their jurisdiction, to this extent that he was bound, if sued in the Supreme Court to appear to plead to the jurisdiction. The whole contention of the Council was that this

was not so, and if any one not being an English born, or in the pay of the Company, was sued in the Supreme Court he was justified in taking no notice of its process. In other words, every defendant was to be judge in his own cause, whether he was subject to the jurisdiction of the Supreme Court or not, residents in Calcutta only excepted. This was equivalent to confining the jurisdiction of the Court by force to the town of Calcutta.'

The conduct of the Government in the Cossijurah Case was reprehensible. If they had thought that the Court went beyond its legitimate powers, they ought to have taken the legal straightforward course of getting a direct decision from the Court upon the questions in which they were directly interested, and testing its correctness by an appeal to the King in Council. In lieu of this constitutional though complicated procedure, they resorted to law lessness and violence.

THE ACT OF SETTLEMENT 1781

Owing to the conflicts between the Supreme Court and the Supreme Council, the condition of civil and judicial administration in the country became intolerable. The relations between the Court and the Council had virtually reached the breaking point.

The policy of the Regulating Act had completely broken down. The Supreme Court represented a unique phenomenon. It was an institution which was detested by all and which had the goodwill of none. The servants of the Company and the officers of the government detested it because it sought to impose a feeling of responsibility in them by confronting with persons accused of oppressive conduct and dealing with their oppression. The Government hated it because it interfered with their administrative methods and sought to control their governmental actions. Its interference in the sphere of revenue collection was obnoxious to the Council. The Supreme Court was disliked by the European community because it sought to stand in the way of their

'violent, illegal, vexatious, dishonest and oppressive practices.' The Court would abruptly and vigorously put a stop to these, which, otherwise, there was none to prevent. The Court was dreaded by the natives also. Inspite of the fact that the Court sought to check the oppressive practices of the servants of the Company towards them, the facts that Bahadur Beg and the Law Officers were dragged from Patna to Calcutta and cast in prison, that the Zemindar of Cossijurah had to undergo humiliation at its hands, and that Nandkumar had to suffer death at its hands, made it an object which aroused awe and fear in the hearts of the Indians. (The procedure, language, law and everything connected with the Court were a mystery to them.)

No longer could things be allowed to drift. To set things right, Parliament had to intervene. In 1781, it passed an Act, known as the Act of Settlement. The Act was passed after a thorough inquiry by the Select Committee of the House of Commons in the administration of justice in Bengal, Bihar and Orissa.

The preamble of the Act of 1781 showed that the contest between the Court and the Council had been won by the latter. Whereas, the preamble stated, many doubts and difficulties had arisen concerning the true intent and meaning of certain clauses and provisions in the Regulating Act and Charter, and by reason thereof dissensions arose between the Court and the Government, and if a suitable and seasonable remedy was not provided there was a danger of further mischiefs and misunderstandings arising; And whereas, the preamble continued, it was expedient that *the lawful government of Bengal, Bihar and Orissa should be supported*, that the revenues thereof should be collected with certainty, and that the inhabitants should be maintained and protected in the enjoyment of all their ancient laws, usages, rights and privileges, it was necessary for the British Parliament to enact the Act of Settlement.

The Act laid down that the 'Governor General and Council of Bengal, shall not be subject, jointly or severally,

to the jurisdiction of the Supreme Court of Fort William in Bengal,' for any act done by them in their public capacity only, and 'acting as Governor General and Council.' In this way, the Government was rendered *immune* from the jurisdiction of the Supreme Court.

The Act in its second section declared that no person would be held responsible by the Court, either civilly or criminally, for acts done by him in pursuance of an order of the Governor General and Council in writing. This immunity, however, was not to extend to any such order of the Governor General and Council as extended to any British subject. In such cases, the Supreme Court was to retain as full and competent a jurisdiction as it hitherto had before the passage of the Act of Settlement.

However, the Governor General and Council, jointly or severally, or any other person acting under their orders were not to be immune from any complaint, suit or process before any *competent Court in England.* (Sec 4.)

Section 8 restricted the jurisdiction of the Court in a very vital respect. It was laid down that the Supreme Court '*shall not have or exercise any jurisdiction in any matter concerning the revenue,* or concerning any act or acts ordered or done in the collection thereof, according to the usage and practice of the country, or the regulations of the Governor General and Council.' Earlier, the Supreme Court used to question the methods adopted by the Company's servants for the collection of revenue so as to check them from indulging into oppressive activities. This occasioned dislocation in the collection of revenue and was thus resented by the Government. Section 8 of the Act of Settlement thus removed one very fruitful cause of friction between the Court and the Council. The sphere of the collection of revenue was thus exempted from the Court's purview.

Section 9 declared that no person was to be subject to the jurisdiction of the Supreme Court on account of his being a landowner, landholder, farmer of land etc. This section

specifically reversed the decision of the Supreme Court in the Patna Cause in so far as it was held there that a farmer of land revenue, being in the indirect service of the Company, was subject to the Court's jurisdiction. The exclusion of land-holders, zemindars and the farmers of land from the Court's jurisdiction removed another fruitful source of friction and hostility between the Government and the Court. The extent of the general jurisdiction of the Court was thus more precisely defined.

Another significant provision of the Act was section 10. It laid down that no person employed by the Company, or the Governor General and Council or by any British subject, was to be subject to the jurisdiction of the Supreme Court in matters of inheritance, succession or contract, except in actions for wrongs or trespasses, and in civil actions by agreement in writing to submit a particular dispute to the Court's decision.

This section requires a little comment. The Regulating Act had placed all persons in the employment of the Company under the jurisdiction of the Supreme Court, in all criminal and civil cases. Many natives, residing beyond Calcutta and being servants of the Company, were thus placed under the jurisdiction of the Supreme Court. The Court's jurisdiction over them in civil cases was very inconvenient to them, as they had to travel long distances to reach Calcutta, and suffer protracted and costly proceedings there in a manner foreign to them. The effect of section 10 of the Act was to exempt these persons from the Supreme Court's jurisdiction in civil matters, in which cases, thereafter, they were subjected to the Company's Courts in the Mofussil. They, however, continued to be under the Supreme Court's jurisdiction in criminal cases and actions arising out of their torts. The native servants of the Company were to be under the Court's supervision in so far as they might be guilty of wrongs and trespasses etc.

Section 17 declared in specific terms that the Supreme Court of Judicature 'shall have full power and authority to

hear and determine,' 'all and all manner of actions and suits' against the *inhabitants of Calcutta*. It was further provided that *all matters arising out of inheritance and succession to land and goods, and all matters of 'contract and dealing between party and party, shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentoos, by the laws and usages of Gentoos.'* It was further provided that 'where only one of the parties shall be a Mahomedan, or Gentoo,' the Supreme Court would apply the 'laws and usages of the defendant.'

Section 18 was merely supplementary to section 17. To show regard to the civil and religious usages of the natives, it was enacted that 'rights and authorities of fathers of families', and 'masters of families', as the same might have been exercised by the Hindu or Mohammedan law, 'shall be preserved to them respectively, within their said families.' It was further enacted that no act done in consequence of the rule and law of caste, respecting the members of the said families only, were 'to be held and adjudged a crime, although the same may not be held justifiable by the laws of England.'

It may be noted that section 17 did not confer any new powers on the Court. The Court exercised jurisdiction on persons resident in Calcutta even earlier. The town of Calcutta, as has already been pointed out, was regarded as British territory, it having been acquired by capture and conquest in 1756 from the then Nawab of Bengal. All its residents were in effect regarded as His Majesty's subjects. The provision in the Act of 1781 appears to be merely the reiteration of an established practice and fact. The Supreme Court's jurisdiction over Calcutta was never in question. The section was merely declaratory of the prevailing views.

The two sections, 17 and 18 were, however, significant from another point of view. The Supreme Court, as conceived by the Regulating Act and the Charter, was to be a Court of English Law. It was not clear as to what law would be applied to the Hindus and Muslims residing in Calcutta

in civil matters. In the mofussil, they had been subjected to their own respective personal law for certain matters partaking of the character of religious and caste disputes. The Act of 1781 was important in so far as it put the Hindu and Muslim inhabitants of Calcutta on the same level as their counterpart in the mofussil. The sections in question showed respect and consideration for the native laws and customs and followed in this respect the same pattern as the Regulations of Warren Hastings in 1772. 'The Statute must not be construed as giving the Court, for the first time, jurisdiction over the inhabitants of Calcutta, but, as providing that they shall not, when one of the defendants is a Hindu or Mohamedan be subject to British law, in questions of successions to lands, rents, and goods, and in matters of contract.'

Section 19 enacted that 'it shall and may be lawful' for the Supreme Court to frame process and make rules and orders for suits civil or criminal, against the natives, so as to accommodate their religion and manners, so far as it was possible, consistent with the due execution of the laws and attainment of justice.

Section 21 was very important in so far as it recognised the Sadar Diwani Adalat at Calcutta as a Court to hear and determine appeals and references from the country courts in civil causes. It was constituted into a court of record. The judgments given therein were to be final and conclusive, 'except upon appeal to His Majesty in civil suits only, the value of which shall be five thousands pounds and upward.' This was a distinct improvement in so far as the Sadar Diwani Adalat, and along with it the Company's judicature, was recognised by the Parliament. The Sadar Diwani Adalat in a way became the Crown's Court, co-equal with the Supreme Court of Judicature, as it was henceforth to derive authority not only from the Company, but also from the Parliament.

Section 22 authorised the Sadar Diwani Adalat to hear and determine all offences, abuses and extortions committed in the collection of revenue, 'or of severities used beyond what'

appeared to the Court customary or necessary to the case. The punishment to be awarded by the Court in such cases was not to extend to death, maiming or perpetual imprisonment.

Section 24 was suggested directly by the Patna Cause. Whereas it was reasonable 'to render the Provincial Magistrates, as well Natives as British subjects, more safe in the execution of their office', it was laid down that no action for wrong or injury 'shall lie in the Supreme Court against any person whatsoever, exercising a judicial office in the country courts, for any judgment, decree, or order of the said Court, nor against any person for any act done by, or in virtue of the order of the said Court.' Section 25 prescribed the process according to which an action could be brought in the Supreme Court against a judicial officer or the magistrate of the Company, for *any corrupt act*. Before such an action could be brought, it was necessary to give a notice in writing to the person concerned, the duration of the notice varying from one month to three months. The notice was to contain fully the cause of complaint. The Court could not give any verdict against the officer or magistrate until and unless it was proved that such a notice had been given. Section 26 declared that no magistrate was to be arrested or obliged to put in bail in any such case, 'until he shall have declined to appear to answer, after notice given' as said above.

Section 27 was also suggested by the Patna Cause. All those persons who were committed to the prison by the Supreme Court in the Patna Cause were to be released, damages awarded against them being paid by the Company.

The Act of 1781 did not stop merely with defining the jurisdiction of the Supreme Court at Calcutta; it also dealt with the question of legislation. The Regulating Act had conferred a limited power of legislation on the Governor General and Council at Fort William[1]. This power could be exercised by them for the town of Calcutta, subject

1. See Page 76-77.

to the control of the Supreme Court. The laws passed by the Governor General and Council under this provision had to be reasonable, and consistent with the laws of England, and had to be registered with the Supreme Court. The power was suitable for Calcutta, as it was regarded as a British settlement where English Law prevailed. But this power could not be suitable for the mofussil of Bengal, Bihar and Orissa, where English law did not apply and where people were accustomed to their own traditional ways of living under their own peculiar manners, laws and customs. Moreover, no reference to Bengal, Bihar and Orissa had been made in the legislative provisions of the Regulating Act, and presumably, they did not extend to the country in general.

Still, since 1772 onwards, the Company's Government at Calcutta had enacted a number of Regulations applicable to Bengal, Bihar and Orissa. This had been done under the powers available to the Company as Diwan. There was no parliamentary sanction or recognition for the exercise of such power of legislation. The Act of 1781, however, conferred for the first time legislative power on the Governor General and Council for the purposes of making laws for Bengal, Bihar and Orissa. By section 23, the Governor General and Council were empowered and authorised to frame Regulations, for the provincial courts and councils. Within six months of the Regulations having been passed, their copies were to be transmitted to the Court of Directors and to one of His Majesty's secretaries of state. His Majesty in Council might disallow or amend the Regulations so passed within a period of two years.

The power of legislation conferred on the Governor General and Council by this provision was to be free from all those restrictions that the Regulating Act had imposed on their legislative power in relation to Calcutta.

The Governor General and Council thus came to have two different legislative powers. One, under the Regulating Act, available for Calcutta, which could be exercised under the

Supreme Court's control. Laws made thereunder were to be reasonable and consistent with the English Law. The second power was derived fromthe Act of Settlement and was available for the provinces of Bengal, Bihar and Orissa. This power was to be free of all restrictions excepting that a law made thereunder could be vetced by the King in Council within two years.

AFTER 1781

The Supreme Court of Judicature at Fort William, with its jurisdiction thus curtailed and defined, continued to serve the cause of justice, with dignity and prestige, for eighty more years. It had started its work in a hostile atmosphere, but, in course of time, it was successful in occupying a high place in the esteem of the people. The functioning of the Supreme Court at Calcutta was so successful and satisfactory, both to the rulers and the ruled, that in course of time similar judicial tribunals were established in the presidency towns of Bombay and Madras.

Another notable feature of the Act of 1781 was the recognition accorded by the Parliament to the Company's judicial system in the mofussil, existing independently of the Supreme Court, with the Sadar Diwani Adalat as the chief Appellate Court of the country.

The result of the two Acts—the Regulating Act and the Act of Settlement—in effect was *to establish and perpetuate two judicial systems, the Presidency Towns system and the Mofussil or Provincial system.* The two judicial systems continued to exist for long side by side, distinctly and independently of each other, each working in its own demarcated sphere. It was only in 1861 that steps were taken in the direction of removing the exclusiveness between the two judicial systems and bringing them nearer each other. This was sought to be effected by establishing a High Court at Calcutta in which the Supreme Court of judicature and the Sadar Diwani Adalat of the Company were merged together.

EXTENSION OF THE COURT'S JURISDICTION

The limits of the territorial jurisdiction of the Supreme Court came to be extended in 1800. The Company acquired Benaras and other territories from the Nawab Vizier of Oudh. By an Act, 39 and 40 Geo. III, c.79,s.20, passed by the British Parliament in 1800, the jurisdiction of the Supreme Court was extended to Benaras and to all factories, districts and places subject to the Presidency of Fort William in Bengal.

CHAPTER VIII

SUPREME COURTS AT BOMBAY AND MADRAS

INTRODUCTORY

In the presidency towns of Bombay and Madras, the judicial system, inaugurated by the Charter of George III in 1753, continued in operation for a longer period than it did at Calcutta. In course of time, it was realised that the existing courts, civil as well as criminal, were utterly inadequate to discharge effectively the important function of administering justice. The population, trade and commerce of these places increased considerably. Comparatively more technical, intricate and complicated issues and causes began to come before the Mayors' Courts for decision, and so, it was thought to be desirable to appoint qualified and trained lawyers as Judges. The Governor and Council at each presidency town formed the Criminal Court of Oyer and Terminer and Gaol Delivery. They also were lay persons, not being very well versed in criminal law and procedure. The nature of criminal cases coming before them for decision had changed since 1753. They became more technical and complicated than what they used to be earlier. For an efficient administration of criminal justice also, it was expedient to have persons who by their training, qualifications and legal knowledge might be more suited to be Judges, and be able to discharge the arduous judicial functions more efficiently. Non-lawyers as Judges in the Courts appeared to be an anachronism in view of the changed context. It was but absolutely necessary to have professional lawyers as Judges.

In 1797, therefore, to reform the existing judicial systems in Bombay and Madras presidencies, the British Parliament, passed an Act[1] authorising the Crown to supersede the judicial arrangements of 1753 and establish the Recorders' Courts instead.

THE RECORDERS' COURTS.

Each of the Recorders' Courts consisted of the Mayor,

1. 37 Geo. III. Cap. 142.

three Aldermen and a Recorder. The Recorder was to be appointed by His Majesty.

The Recorder was to be a lawyer of not less than five years' standing. He was to be the President of the Court.

The Recorder's Court was to be a court of record. It was to have full power and authority to exercise and perform all Civil, Criminal, Ecclesiastical, and Admiralty jurisdiction. The jurisdiction, powers and authority to be conferred on the Recorder's Court by the Royal Charter to be issued by the Crown in pursance of the Act of 1797, were to be on lines similar to those of the Supreme Court of Judicature at Calcutta. Like the Supreme Court at Calcutta, the Recorder's Court was to be a Court of Oyer and Terminer and Gaol Delivery for the respective settlement.

The jurisdiction of the Recorder's Court was to extend over the *British subjects*, resident within the territories of the respective settlement as well as those residing in the territory of native Princes in alliance with the government. The Recorder's Court was authorised to hear and determine all complaints against any of *His Majesty's subjects* for any crime, misdemeanour and oppression committed by them, or any suit or action against them. The Recorder's Court was to exercise jurisdiction on any person, who was *employed by*, or was directly or indirectly *in the service of*, the Company or any of His Majesty's subjects.

All the restrictions imposed on the Supreme Court of Judicature at Fort William by means of the Act of Settlement of 1781, were also extended to the Recorder's Court. Accordingly, the Recorder's Court was not to have any jurisdiction or authority in any matter concerning revenue. No person was subject to its jurisdiction by reason of his being a landowner, landholder, or farmer of land revenue. The Governor and Council of the settlement was to be immune from arrest. No action against them, either individually or collectively, could be entertained by the Recorder's Court for anything done by them in their public capacity.

Each of the Recorders' Courts was to have full power and authority to hear and determine all suits or actions that might be brought against the inhabitants of each of the respective presidency towns of Bombay and Madras. *In matters of succession and inheritance and matters of contract between party and party, the Recorder's Court, like the Supreme Court at Calcutta, was to administer Hindu Law to the Hindus, Mohammedan Law to the Muslims, and the law of the defendant if parties belonged to different religious pursuasions.* No action for wrong or injury was to be entertained against a person exercising a judicial office in a court in the country. The jurisdiction of the Recorder's Court in this behalf was to be the same as that of the Calcutta Supreme Court.

Appeals from the decisions of the Recorder's Court were to lie to the King in Council, practically on the same basis as the appeals from the Supreme Court at Calcutta.

The Recorder's Court absorbed into itself the Mayor's Court and the Court of the Oyer and Terminer and Gaol Delivery consisting of the Governor and Council in each of the two settlements.

COURTS OF REQUESTS

The Act of 1797 made an important change in the jurisdiction of the Courts of Requests existing in the three presidency towns of Calcutta, Madras and Bombay under the Charter of 1753[1]. The process of these Courts had been found to be very convenient and beneficial for the decision of petty civil suits. The Charter of 1753 had fixed the jurisdiction of these Courts at five pagodas. The Act of 1797 extended their jurisdiction to *eighty rupees.*

RECORDER'S COURT V. MAYOR'S COURT

In pursuance of the Act of 1797, George III, King of England, issued Charters establishing Recorders' Courts at Bombay and Madras presidency towns. The Charters were

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1. See Page 49.

issued on February 1, 1798; the terms and conditions, contained therein, and the powers and jurisdiction conferred by them on the Recorders' Courts, were on lines prescribed by the Act of 1797, which were similar to the Supreme Court of Judicature at Fort William under its Charter of Justice, the Regulating Act and the Act of Settlement 1781.

From the point of view of composition, the Recorder's Court was *the old Mayor's Court with the addition of a lawyer, as the Recorder, to be appointed by the Crown.* The Mayor's Court consisted of Judges who were entirely ignorant of law or legal procedure. These lay Judges were not in a position to handle effectively the technical and delicate legal problems that constantly arose due to the expansion and development of the presidency towns. It had become essential to introduce some legal element in the Mayor's Court, and it was as a consequence of this realization that the Recorders' Courts at the two settlements had been created. A Recorder's Court, due to the presence of a professional lawyer, was a much more effective instrument of justice than its predecessor the Mayor's Court.

Besides, the Recorder's Court differed in some important respects from the Mayor's Court. The Recorder's Court was a court of civil as well as criminal jurisdiction; the Mayor's Court was a court of civil jurisdiction only.

An appeal from the Mayor's Court lay to the Governor and Council; a further appeal from the Governor and Council, in all cases beyond 1000 pagodas, lay to the King in Council. Appeals from the decisions of the Recorder's Court, on the other hand, lay directly to the King in Council in all cases above 1000 pagodas. There was no intermediary court of appeal between the Recorder's Court and the King in Council. No decision of the Mayor's Court was final, as an appeal in every case could be made to the Governor and Council. But the decisions of the Recorder's Court in cases valuing less than 1000 pagodas were final.

The Charter of 1753 had exempted suits among the

natives from the jurisdiction of the Mayor's Court. It could take cognisance of such suits only when placed before it voluntarily by both the parties. The Recorder's Court suffered from no such restriction. It was empowered to take into cognisance all kinds of suits and disputes arising among the residents of the presidency town.

The Mayor's Court was supposed to be a court of English Law. It was expected to apply this law even to the natives. How far it could really apply English Law in the absence of any professional aid, is a difficult question to answer. The Recorder's Court, however, due to the presence of an English lawyer as a Judge, was better able to apply English Law. But then the Recorder's Court was not purely a Court of English Law, it having been directed to apply Hindu I aw and Mohammedan Law in certain cases.

THE SUPREME COURT AT MADRAS

The Recorder's Court at Madras did not enjoy a very long span of life. In 1800, the British Parliament passed an Act authorising the Crown to abolish the Recorder's Court and erect a Supreme Court of Judicature in its stead by a Royal Charter. The powers vested in the Recorder's Court were transferred to the Supreme Court, which was to exercise *the same jurisdiction and powers, subject to the same restrictions,* as the Supreme Court of Judicature at Fort William in Bengal.

The Letters Patent granting the Charter of Justice to the Supreme Court at Madras were issued by King George III on the 26th December, 1801. The Supreme Court was to enjoy Civil, Criminal, Admiralty and Ecclesiastical jurisdiction on the same basis as the Supreme Court of Judicature at Calcutta.

THE SUPREME COURT AT BOMBAY

The Recorder's Court at Bombay functioned for a longer period than its counterpart at Madras. Ultimately, an Act passed in 1823, during the reign of George IV, authorised the English Crown to abolish the Recorder's Court at Bombay and establish a Supreme Court of Judicature in its place. The

Supreme Court of Judicature at Bombay was to consist of the same number of Judges as the Supreme Court of Fort William in Bengal. It was to be invested *with the same powers and authorities* as the Supreme Court of Judicature at Fort William, with a similar jurisdiction and powers, and subject to the same limitations, restrictions and control.

The powers of the Supreme Courts at Madras and Bombay were placed on an equal footing with those of the Supreme Court at Calcutta, in an explicit manner by the 17th section of the Act of 1823, which declared that it should be lawful for the Supreme Court of Judicature at Madras, and the Supreme Court of Judicature at Bombay, within their respective territorial jurisdiction, to do, execute, perform, and fulfil, all such acts, authority, duties, matters and things whatsoever, as the Supreme Court of Judicature at Fort William was or might be authorised, empowered, or directed to do, execute, perform, and fulfil within the factory of Fort William in Bengal or places subject to or dependent upon the Government thereof.

The Letters Patent granting a Charter of Justice to the Supreme Court of Bombay were issued by the Crown on 8th December, 1823.

By the first quarter of the 19th century, therefore, there were established three Supreme Courts of Judicature in the three presidency towns of Calcutta, Bombay and Madras, more or less on a uniform basis.

CONFLICT IN BOMBAY

Within a very short time of its creation, the Supreme Court of Bombay came into conflict with the Government, which though not so serious was yet reminiscent of the conflicts arising in Bengal during 1774—79. The conflict in Bombay was the result of the Supreme Court issuing certain writs of Habeas Corpus to certain persons beyond the Bombay town.

The first case was that of Moro Raghonath, a boy who was

detained for over a year and, as was stated, under circumstances of great hardship and cruelty, by his grandfather, Pandurang Ramchander, residing at Poona. A relative of the boy moved the Supreme Court for the issue of the writ of Habeas Corpus on 25th August 1828. The motion was opposed by the Advocate General on the ground that Ramchander and Raghonath were natives residing at Poona and so were not amenable to the jurisdiction of the Supreme Court. The Court overruled the objection and ordered the issue of the writ.

The other was the case of Bappoo Gunness, who was detained in custody by virtue of an order of the Adalat Court of Concan. Having been found guilty of embezzlement he had been sentenced to two years' imprisonment and a fine of Rs. 350. The Supreme Court issued the writ of Habeas Corpus to the Gaoler.

The Governor and Council of Bombay forbade a return being made to any of the writs. Consequent on this opposition from the Government to its process, the Supreme Court of Judicature, on first April 1829, declared that it had ceased on all its sides, and that it would perform none of its functions until the Court received an assurance that its authority would be respected, and its process obeyed and rendered effectual by the Government of the Presidency.

The Judge of the Supreme Court, Sir Peter Grant—he being the only surviving Judge, the other two having died—made a petition to His Majesty against this intrusion of the Government and prayed His Majesty 'to give such commands concerning the same as to His Royal Majesty's wisdom should seem meet, for the due vindication and protection of the dignity and lawful authority of His Majesty's Supreme Court of Judicature at Bombay.'

The premises in the petition came in for discussion and consideration before the Privy Council.[1] The report of the Privy Council, which was affirmed by His Majesty, was :—

1. In Re The Justices of the Supreme Court of Judicature. 1 Knapp. P.C. 1, 12 E. R. 222.

"That the writs of Habeas Corpus were improperly issued in the two cases referred to in the said petition.

"That the Supreme Court has no power or authority to issue a writ of Habeas Corpus except when directed either to a person resident within those local limits wherein such Court has a general jurisdiction, or to a person out of such local limits, who is personally subject to the civil and criminal jurisdiction of the Supreme Court.

"That the Supreme Court has no power or authority to issue a writ of Habeas Corpus to the gaoler or officer of a native court as such officer, the Supreme Court having no power to discharge persons imprisoned under the authority of a native court."

"That the Supreme Court is bound to notice the jurisdiction of the Native Court, without having the same specially set forth in the return to a writ of Habeas Corpus." The verdict of the Privy Council thus went against the Supreme Court.

THE SUPREME COURTS—JURISDICTION AND LAWS ADMINISTERED BY THEM

The Supreme Courts in the three presidencies had five distinct jurisdictions, Civil, Criminal, Equity, Ecclesiastical and Admiralty.

The jurisdiction of the Supreme Courts of Judicature, to state briefly, extended over the following categories of persons :

1. British subjects or His Majesty's subjects, in all matters civil and criminal ;

2. The inhabitants of Calcutta, Madras and Bombay presidency towns, whether natives or others, in all matters civil and criminal. The natives, in some civil matters, were to have justice administered to them according to the Hindu or the Mohammedan Law.

3. Persons who were employed by, or were directly or indirectly in the service of, the Company or any British subject,

for acts committed as such. They were excluded from the civil jurisdiction except in matters of wrongs or torts.

4. Native subjects, in civil matters, for transactions in which they had bound themselves to be amenable to the Supreme Court by an agreement in writing.

5. All persons whatsoever for crimes maritime. This was the result of section 110 of the Charter Act of 1813. The Company's Courts did not have any jurisdiction over crimes maritime, and there were doubts whether the Courts of the Crown could take cognisance of maritime crimes committed by those persons who were not otherwise subject to their ordinary jurisdiction. This doubt was removed in 1813 and it was enacted that His Majesty's Courts at Calcutta, Madras and Bombay, exercising Admiralty jurisdiction would be authorised 'to take cognisance of all crimes perpetrated on the High Seas, by any person or persons whatsoever, in as full and ample a manner as any other Court of Admiralty jurisdiction established by His Majesty's authority whatsoever.....'

The Law administered by the Supreme Courts at the three presidencies might be classified under the following seven distinct heads :

1. The Common Law as it prevailed in England in the year 1726[1], and which had not been subsequently altered by Statutes, especially extending to India, or by the Acts of the Legislative Council of India.

2. The Statute Law which prevailed in England in 1726, and which had not been subsequently altered by Statutes especially extending to India, or by the Acts of the Legislative Council of India.

3. The Statute Law expressly extending to India, enacted after 1726.

4. The Civil Law as it obtained in the Ecclesiastical and Admiralty Courts in England.

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1. According to the legal opinion, English law had been introduced in the three presidency towns in 1726. See pages 98.

5. Regulations made by the Governor General in Council and the Governors in Council under the powers conferred on them by the various parliamentary enactments. After 1833, the Acts of the Legislative Council of India.

6. Hindu Law in actions regarding inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party in which a Hindu was a defendant.

7. Mohammedan Law in actions regarding inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party. in which a Mohammedan was a defendant.

It must be clear to every one that a system, which embraced the dispensation of so many codes of law and the exercise of so many jurisdictions, must be a complicated affair and the greatest difficulty must have attended in bringing such a system to perfection. In course of time, however, a process of codification of laws started, which mitigated the complexity of the system of administration of justice.

CHAPTER IX

RE-ORGANISATION OF THE ADALAT SYSTEM IN BENGAL

INTRODUCTORY

The Patna Cause had revealed that a very unsatisfactory state of affairs prevailed in the Company's Courts in the mofussil of Bengal, Bihar and Orissa. The function of administering justice was mainly discharged by six Provincial Councils, who were also responsible for the collection of revenue under the plan of 1774.[1] The Councils, as a rule, devoted much of their time to the revenue work. They attached only a secondary importance to the function of administering justice. The English gentlemen, composing these Councils, were ignorant of the native law, language and customs and thus had little inclination to execute their judicial functions in person. The Provincial Councils had left the task of deciding causes practically in the hands of the native law officers attached to them for the purpose of expounding the indigenous systems of law. The manifold defects and the essential weaknesses of the system had been betrayed in a very telling manner by the Patna Cause, as a result of which it had become very clear that if people at large in the country were to have even a semblance of justice, then the system in operation must be thoroughly overhauled and completely renovated.

JUDICIAL SCHEME OF 1780

In 1780, Warren Hastings, the Governor General, took upon himself the task of re-organising the Adalat System in the mofussil. He formulated a new plan, which was promulgated in that year. The salient features of the new plan were :—

In each of the six Divisions of Calcutta, Murshidabad, Burdwan, Dacca, Purnea and Patna, in which the three provinces of Bengal, Bihar and Orissa, had been divided in 1774[1], a Court of Diwani Adalat, a court of civil jurisdiction, was

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1. See page 68

established. Each of the six new Diwani Adalats was to be presided over by an Englishman, a covenanted servant of the Company. He was to be known as the Superintendent of the Diwani Adalat.

The six Provincial Councils established in the year 1774 in the six Divisions, were continued. They were, however, divested of their judicial functions. *After 1780, the Provincial Councils were to confine themselves only to revenue functions,* viz. the collection of revenue in the respective Division as also deciding cases arising out of the revenue administration. *The Councils were no longer to exercise any judicial functions.*

The jurisdiction of the Superintendent of the Diwani Adalat was to be *distinct from, and independent of,* the Provincial Council of the Division.

The Diwani Adalat was empowered to decide all causes of a civil nature like inheritance, property, contract etc. The Superintendent of Diwani Adalat could refer small cases, not exceeding one hundred rupees in value, to some zemindar or public officer residing near the parties' place of residence. The Court was to sit at least three times a week. The Superintendent of the Adalat was to take an oath to administer justice without fear or favour. The Adalat was enjoined to keep regular and proper records of all its proceedings.

As usual, in cases regarding inheritance, marriage, caste and other religious usages and institutions, the Adalat was to administer the laws of Koran for the Muslims and the laws of the Shaster for the Hindus. To expound these indigenous systems of law, with which the English Judge was unacquainted, provision was made for the native law officers, Muslim Kazis and Hindu Pandits, to attend the Court.

All decisions of the Diwani Adalat were to be final in cases where the subject matter involved did not exceed *one thousand rupees.* Thereafter, an appeal lay to the Sadar Diwani Adalat situated at Calcutta and composed of the Governor General and Council.

For the first time, the Government in 1780 levied *court fees* on the suitors. The scale of fees varied with the value of the subject matter involved in a particular suit, the maximum being 5% and the minimum, 2%.

MERITS AND DEFECTS OF THE SCHEME

Under the Scheme of 1780, six Courts of Diwani Adalats came to be constituted in the provinces of Bengal, Bihar and Orissa. The chief merit of the new judicial plan was *the separation of the judicial from the executive functions.* The newly established Courts of Diwani Adalat were to be purely judicial tribunals, having no executive or revenue functions to discharge, but designed exclusively to administer justice in civil causes. The executive functions like the collection of revenue etc. were left in the hands of a distinct body, the Provincial Council of the Division. The two functions—judicial and executive—thus came to be vested in distinct hands. It was for the first time since the direct assumption of administration by the Company that such a bifurcation of functions was effected. It was a very wholesome change, for the first requisite for a pure and efficient administration of justice in a country is the separation of judiciary from the executive. The new Courts of Diwani Adalat were to devote the whole of their time to the judicial work which was a great improvement over the previous system of 1774 under which the Provincial Councils used to spend only a fraction of their time to judicial work as they were more interested in the revenue business.

The new scheme was not, however, free from blemishes or faults. Its one most conspicuous defect was the *paucity of Courts* to administer justice in civil causes. In such a vast area as the three provinces of Bengal, Bihar and Orissa, there were only six Courts of Diwani Adalat. Each Adalat thus had very wide territorial jurisdiction. This put the people to great inconvenience and trouble, because they had to travel long distances to reach the Divisional Headquarters—the seat of the Adalat—in search of justice in all disputes, simple or complex, petty or otherwise. This meant waste of time, energy and

money on their part. Under these circumstances, many thought it prudent to forgo justice and suffer a wrong silently rather than suffer the great inconvenience involved in reaching the Court.

The judicial plan of 1780 had endeavoured to solve these difficulties by providing that cases, not exceeding Rs. 100/- in value, might be referred by the Superintendent of the Diwani Adalat to some zemindar or public officer residing near the place where the cause of action actually arose. But even this arrangement did not afford any substantial relief to the poor people in so far as they had to come, at least once, to the Divisional Headquarters to file the suits in the Adalat. It was only after the parties had taken this preliminary step that the Superintendent could refer the suit to some authority near the parties' place of residence. In those days of inadequate means of communication, it was trouble enough for the people to cover even for once the long distance from their residence to the seat of the Adalat.

Moreover, the zemindars to whom suits of small value were referred for decision under this arrangement, were to act as *honorary judges* without receiving any fee or remuneration for their labours. There was thus a danger of the zemindars misusing these judicial powers to their own selfish ends. Such a system could hardly be effective and conducive to the promotion of fair and free justice in the country. What was needed in fact was *a regular cadre of properly paid subordinate judicial officers, having their courts interspersed in the interior of the country*. But this was yet a very far-fetched dream.

Further, the paucity of Courts under the scheme of 1780, placed a heavy strain and a great responsibility on each of the Superintendents of the Diwani Adalats. Each one of them had a large territorial area under his care. The number of civil causes arising in the area was always large. A Superintendent was thus called upon to decide a larger number of cases than he could possibly cope with.

IMPEY APPOINTED TO THE SADAR DIWANI ADALAT

In October, 1780, Hastings took a very important step in the direction of making Company's Judicature more effective and efficient as an instrument of justice. He, with the consent of his Council, appointed Sir Elijah Impey, the Chief Justice of the Supreme Court of Judicature at Fort William, as the sole Judge of the Sadar Diwani Adalat also. Many factors had induced Hastings to take this step.

Hitherto, the Sadar Diwani Adalat was composed of the Governor General and members of the Council. These persons were saddled with multifarious other responsibilities. They could not, on that account, devote the requisite amount of time to their judicial functions in the Sadar Adalat. The sittings of the Court were, therefore, very irregular.

Further, the Governor General and members of the Council were non-lawyers and so had neither the inclination nor the capacity to perform the complex judicial duties in the Sadar Diwani Adalat. They appreciated the fact that a proper functioning of the Sadar Adalat was a pre-requisite for the proper functioning of the whole of the Company's judicial system in the mofussil. The Sadar Diwani Adalat was to hear appeals from the lower courts, but more so, it was to exercise a close superintendence and supervision over the lower courts in order to ensure their proper and regular functioning. This was a heavy responsibility and could be discharged effectively only by a person who had time, inclination, capacity and adequate training to attend to the work of the Sadar Diwani Adalat. From this point of view, the appointment of Impey to the Sadar Diwani Adalat was a very welcome move on the part of the Government. The supervision of the Sadar Court by an experienced and trained lawyer was expected to eradicate abuses and evils from the Company's judicial machinery and put it on a sounder and a healthier basis than it hitherto had been. As the Patna Cause betrayed, the Sadar Adalat was more of a mere formality. It never functioned properly or regularly, and the appointment of Impey was expected to cure this malady.

Lastly, the appointment of Impey to the Sadar Diwani Adalat was expected to mitigate the unfortunate dissensions which had cropped up between the Supreme Court, on the one hand, and the Supreme Council, on the other. There were two distinct judicial systems operating in Bengal at the time. One was represented by the Supreme Court of Judicature. The other was the Company's System, with the Sadar Diwani Adalat at its apex. There was no meeting point between them[1]. There was hostility and rivalry between them. Each was independent of the other. The appointment of Impey, the Chief Justice of the Supreme Court of Judicature, as the Judge of the Sadar Diwani Court also, was expected to provide a connecting link between the two rival judicial systems.

Impey took over charge of the Sadar Diwani Adalat in 1780, his *along with* duties as the Chief Judge of the Supreme Court. He enthusiastically set in hand the work of re-organising and revitalising the Company's Judicature. Within a very short time, he compiled a set of Regulations, a sort of a *civil code*, which was a collection and a digest of all the previous Regulations having a bearing on the administration of justice in the mofussil with a number of additions, necessary modifications and changes. The *code* came into force in 1781 and put into operation a refined scheme to administer justice in the country.

SCHEME OF 1781

Impey, in his scheme of 1781, sought to mitigate the evils arising out of the paucity of the Courts of Diwani Adalat in the country. Hastings had established only six such Courts in 1780. The arrangement was clumsy. The inconvenience felt by the public as a result of the small number of Courts was great. Impey in 1781 increased the number of Courts to *eighteen*. The important feature of the scheme of 1780, that is, the separation between the judicial and the revenue functions, was retained. It was now expressly laid down that the Judges of the Diwani Adalats would

1. See Page 89.

have a *jurisdiction completely distinct and separate* from the jurisdiction of the person *in charge of revenue collection, revenue work and revenue cases.* The Courts of Diwani Adalat were specifically debarred from taking cognisance of any matter or cause which, directly or indirectly, related to public revenue.

The Judge of the Diwani Adalat was authorised to refer for decision all cases involving a subject matter valuing upto Rs. 100/- to some zemindar, public officer or principal man near the place where the cause of action arose. In such cases the arbitrator was to report his award to the Judge of the Diwani Adalat, who could approve, disapprove or alter it. The idea underlying this provision was to provide to the people a proximate forum for deciding petty disputes and thus avoid the inconvenience involved in the parties, with their witnesses, covering long distances to reach the seat of the Diwani Adalat.

The old provision prescribing Hindu and Mohammedan Laws in certain cases was repeated. Cases covered by this provision were succession and inheritance, marriage, caste and other religious usages or institutions. This provision covered only a few categories of cases. No provision had been made, hitherto, to prescribe the rule of law which the Courts might apply in many other varieties of cases not covered by this provision. Since 1772, when Hastings for the first time laid down this provision prescribing the law to be applied to the few categories of cases, no other provision had been made to cover the many other kinds of cases which usually came before the Adalats for decision. This omission was now rectified by Impey. Section LX of the Regulation of 1781 laid down that '*In all cases, within the jurisdiction of the Mofussil Diwani Adalats, for which no specific directions are hereby given the respective judges thereof do act according to justice, equity and good conscience.*'

Similarly, section XCIII provided 'That in all cases, for which no specific directions are hereby given, the Judge of the Sadar Diwani Adalat do act according to *justice, equity* and *good conscience.*'

The code of 1781 also laid down the procedure to be followed by the Courts of Diwani Adalat. The procedure was designed to promote quick, cheap and impartial justice.

Impey as Chief Justice of the Supreme Court had had occasion to render judgment in the famous Patna Cause, which revealed that the Judges of the Diwani Adalats usually left the actual decision of cases in the hands of the native law authorities, and did not exert their own individual judgment and discretion. This was an unwarranted practice which Impey had criticised very severely. To do away with this evil, he took special care to include a provision in the code of 1781 forbidding the irregular practice. Section XXXIX laid down that 'No Judge of any Mofussil Diwani Adalat shall upon any pretence whatsoever, cause to be made any report of any matters of fact relating to any cause depending there before him, in order to the making of any decree, by any officer or officers, or any person whatsoever, other than in the cases specially mentioned in these regulations, nevertheless, that it be competent to such Judge to refer any question arising on the Mussalman or Hindoo Law to the Moulvies or Pundits of the Court, respect being had to the law in which each is conversant.' It was made clear that the questions of fact in every cause must be decided by the Judge himself. The opinion of Moulvies or Pandits was to be sought only after the facts had been decided by the Judge. The native Law Officers were to confine themselves only to the function of expounding the law on the basis of the facts decided by the Judge.

The Patna Cause had also revealed that the Sadar Diwani Adalat functioned very irregularly and ineffectively. The Governor General and members of the Council who used to sit there as Judges had neither the time nor the inclination to devote themselves to the judicial functions. To make the Sadar Adalat more lively and active an institution, Impey was appointed as its sole Judge. The Regulation of 1781, therefore, made certain provisions for reforming the Sadar Court. Its functions, powers and jurisdiction were more clearly defined.

The Sadar Diwani Adalat was to perform the following functions :

1. *Appellate* : The primary function of the Court was to hear appeals from the lower courts in all cases where the subject matter involved was one thousand rupees in value.

2. *Original* : The Court was authorised to try and determine any cause or matter of a civil nature referred to it by the Governor General and Council.

3. *Control and Superintendence* : The Sadar Court was to exercise control and supervision over the lower Diwani Adalats. It was authorised to receive any original complaint, cognisable by a lower Court but neglected or refused by it to entertain. The Sadar Adalat was to refer such a cause to the Mofussil Diwani Adalat requiring it to try expeditiously.

On a report of misconduct against a Judge of the Mofussil Diwani Adalat, the Sadar Diwani Adalat was empowered to suspend the Judge and report the matter to the Governor General and Council for final decision.

Thus the Sadar Diwani Adalat was not to confine itself only to hearing appeals from the lower Courts but was to act as the watchdog over the whole of the Company's Judicial System.

RECALL OF IMPEY

Impey's association with the Sadar Diwani Adalat as its sole Judge was bound to be very beneficial and advantageous to the Company's Judicial System. Within the short period that he had been at the post, he reformed the Company's Judicature and did away with many of its faults and blemishes so as to make it a more regular and effective machinery for the administration of justice to the people at large. His code of civil procedure—the first attempt in India to codify the law of civil procedure—was of immense value and utility. The Sadar Diwani Adalat began to sit more regularly and frequently. Impey's association provided a fillip to the

Company's Courts to work harder, more regularly and properly.

Had Impey remained in the Sadar Diwani Adalat for some time, there was no doubt, the Company's Judicature would have improved immensely. But, unfortunately, Impey's connection with the Sadar Adalat was snapped very early. He had to lose both his chief judgeship of the Supreme Court as well as the judgeship of the Sadar Adalat. His appointment to the Sadar Diwani Adalat was viewed with disfavour in England. As the Chief Judge of the Supreme Court, he received a salary from the Government. The Government at Fort William further granted him an additional sumptuous salary of Rs. 5000/- per month for his labours as the Judge of the Sadar Diwani Adalat. He held the latter office at the sufferance of the Company's Government at Calcutta. This arrangement was considered to be improper for the Chief Justice. It appeared as if Impey had compromised his independence as the Chief Justice of the Supreme Court. People came to look down this arrangement as a sort of a bribe, offered by the Company to the Chief Justice to placate him so that the friction, that had unfortunately arisen between the Supreme Court and the Supreme Government at Calcutta, might be eased. The result of adverse public opinion was that the British Parliament passed a resolution requesting the Crown to recall Impey from India. Consequently, in 1782, Impey left India for England, and the Sadar Diwani Adalat lapsed again into the hands of the Governor General and Council.

REFORMS IN CRIMINAL JUDICATURE

As already pointed out, Hastings in 1772 established the Court of Sadar Nizamat Adalat at Calcutta. It consisted of a Muslim Judge, with the title of Daroga, who was assisted by the Mohammedan Law Officers Kazi, Mufti and Moulvies. Its functioning was supervised by the Governor General, Warren Hastings.

In 1774, the Supreme Court of Judicature was established at Calcutta. Apprehending interference from the Supreme

Court into the affairs of the Sadar Nizamat Adalat, the Government at Calcutta decided to change its venue. In 1775, therefore, the Sadar Nizamat Adalat was shifted from Calcutta to Murshidabad and was placed directly in the charge of the Nawab. The Naib Nawab, Mohd. Reza Khan, was to look after the working of the Sadar Nizamat Adalat. In 1775, therefore, the whole of the criminal judicature in the country lapsed into the hands of Reza Khan.

This was an unfortunate development. Reza Khan's supervision over the working of the criminal courts was very weak and ineffective. Many vices entered the administration of criminal justice. The criminal courts became instruments of torture in the hands of unscrupulous officers. There was no machinery to bring the offenders to book. Innocent persons were punished whereas the guilty escaped with impunity. A pitiable and miserable state of affairs prevailed in the criminal courts.

In 1781, Hastings directed his attention to this sorry state of affairs and introduced some reforms in the sphere of criminal law and justice. In the first place, he devised a machinery to arrest and apprehend criminals and bring them to the criminal courts for trial. For this purpose, the Judges of the Mofussil Diwani Adalats were appointed as Magistrates also. They were to arrest all those persons who were suspected of having committed crimes, and were to send them to stand their trial at the nearest Mofussil Fozdary Adalat. No Magistrate was to have any judicial powers. He could not try the accused himself. His main function was to arrest the criminal and despatch him to the nearest criminal court for trial with a charge against the person in writing. This step was expected to promote law and order in the countryside.

To keep a watch over the general administration of criminal justice and the functioning of the criminal courts in the country, Hastings created a new Department at Calcutta. The Department was to receive reports and returns of the proceedings of all Fozdary Courts. The Magistrates were

to send monthly reports to this Department showing the number of persons arrested, charges laid against them and the persons sent by them for trial to the Fozdary Courts.

The Mofussil Nizamat Courts were to transmit monthly reports showing the number of persons in actual confinement, persons arrested, persons released, and the persons tried and the sentences awarded to them. Similar reports were to be transmitted by the Sadar Nizamat Adalat, which continued to sit at Murshidabad.

The Head of this new Department at the capital was to be a covenanted servant of the Company and was to be known as the *Remembrancer of Criminal Courts*. He was to have charge of all the reports sent to him by the various Fozdary Courts and the Magistrates. He was to analyse these reports, prepare extracts from them and arrange them in some proper order. In this way, Warren Hastings sought to introduce a system of control and supervision over the administration of criminal justice in the country.

In the very nature of things, the control, exercised by the Remembrancer on the country's criminal judicature, was very imperfect and weak. The system was hardly comprehensive or effective. The Remembrancer had to depend for information on the reports furnished to him by the Courts. The reports hardly revealed a true state of affairs. It was not difficult for the Mofussil Fozdari Courts to manipulate the reports so as to give a more favourable picture of the state of affairs prevailing therein.

Nothing more, however, was done by Hastings in the field of criminal law and justice. Things continued to drift till Lord Cornwallis scrapped the entire system completely and introduced in its place a new scheme for the administration of criminal justice in 1790.

CHAPTER X

JUDICIAL MEASURES OF LORD CORNWALLIS

INTRODUCTORY

The governor generalship of Cornwallis constitutes a very remarkable and a highly constructive period in the history of the Indian Legal Institutions.

Lord Cornwallis reached India in 1786 and stayed there till 1793. During his tenure of office as Governor General, the judicial system in the provinces of Bengal, Bihar and Orissa was re-organised on a completely new basis. He was the first to put into practice the important principles of 'Rule of Law' and administration according to law.

He introduced changes in the judicial system in three instalments : firstly, in 1787 ; then in 1790 ; and lastly in 1793. The Adalat System which he left behind in Bengal won praise and encomium from many quarters, and enjoyed such a high place in the esteem of persons then at the helm of affairs that it was adopted as the model on which the judicial systems in the provinces of Madras and Bombay were subsequently organised.

THE SYSTEM OF 1787

The Judicial Scheme of 1781, introduced during the governor generalship of Warren Hastings, envisaged division of two functions—revenue and judicial. Each of them was vested in a distinct set of functionaries. In course of time, however, a feeling grew that to maintain two distinct organisations, one for revenue administration and other for the administration of justice, was a very costly proposition. Many highly placed officers of the Company thought that the amalgamation of the execution of two functions would result in efficiency, simplicity and economy in the cost of administration.

The scheme of 1787 was conceived with the set purpose of effecting economy in the administrative expenditure of Bengal, Bihar and Orissa. The Court of Directors of the East

India Company instructed Lord Cornwallis to unite the revenue and judicial organisations to effect economy in administrative costs. Lord Cornwallis carried out these instructions faithfully and thus was born the Judicial Plan of 1787. *The keynote of this plan was economy.* Certain measures to achieve efficiency and purification in the administration were also adopted. These objects were sought to be achieved by reducing the number of districts by enlarging the area of each and providing for higher salaries for officers appointed to administer them.

The salient features of the Scheme of 1787 were :

1. The number of districts was reduced from 36 to 23. In each district, an Englishman, a covenanted servant of the Company, was appointed as the Collector.
2. The Collector was to collect revenue. He was also to decide all cases arising out of revenue.
3. The Collector was to act as the Judge in the Mofussil Diwani Adalat and thus administer justice in civil cases to the common man.
4. The Collector was also to act as the Magistrate in the district. In this capacity it was his duty to arrest and apprehend criminals in the district and to send them to the nearest Mofussil Nizamat Adalat for being tried.

In 1781, Warren Hastings had conferred magisterial functions on the Judges of the Mofussil Diwani Adalats. Now in 1787, these functions were transferred to the Collectors who became the Judges of the Diwani Adalats in the new dispensation.

In 1781, the magistrates were empowered to arrest and apprehend criminals without having any authority to try them—not even those who were guilty of petty offences. All the arrested criminals were to be tried by the Mofussil Nizamat Adalats. The criminal courts, therefore, were very much over-worked. There was more work before them than they could possibly discharge. Persons accused of petty offences had to await their turn for being tried for long. They thus

endured more hardships than their offences in fact merited, which resulted in a substantial miscarriage of justice. To avoid this, Lord Cornwallis in 1787 authorised the Magistrates to hear and determine all complaints for petty offences and to punish the same by corporal punishment, not exceeding fifteen strokes, or imprisonment not exceeding fifteen days. All cases which merited a greater punishment had to be sent by the Magistrates as usual to the Mofussil Nizamat Adalats for trial.

5. Although the same person, the Collector, was to discharge multiple duties in several spheres, yet he was directed to keep his various functions *distinct* from each other as far as possible. The Collector was *not to blend* his various functions. He was to discharge each part of his duties in the capacity of Collector, Judge or Magistrate, separately according to the Department to which it belonged.

The Regulation of 1787, therefore, laid down that the Collector should keep his revenue functions confined to the Revenue Court, to be known as the *Mal Adalat*. The Collector was to discharge his judicial functions in civil cases in the Court of *Mofussil Diwani Adalat*. The Collector could not take cognisance of any matter relating to the common justice in civil cases in the Mal Adalat. Similarly, he was not to deal with any matter relating to revenue in the Mofussil Diwani Adalat.

6. The Board of Revenue, located at Calcutta, was to hear and decide appeals from the decisions of the Collector in his Mal Adalat. A further appeal from the Board of Revenue lay to the Governor General in Council on the executive side.

7. Appeals from the Mofussil Diwani Adalat, in all cases where the subject matter involved exceeded Rs. 1000/- in value, lay to the Sadar Diwani Adalat.

8. Decisions of the Sadar Diwani Adalat were to be final except in cases, where subject matter valuing £5000 or over was involved. In all such cases, a further appeal lay to the King

in Council, under the provisions of the Act of Settlement, 1781[1].

9. The Sadar Diwani Adalat was to consist of the Governor General and members of his Council. They were to be assisted by the Chief Kazi, Chief Mufti and two Moulvies. The function of the native Law Officers was to expound the Muslim law. In the same way there were Hindu Pandits to expound the provisions of the Hindu Law.

10. A subordinate officer, known as the Register, was appointed to provide aid and assistance to the Collector in the discharge of his judicial functions in the Mofussil Diwani Adalat. The Judge of the Diwani Adalat was empowered to authorise the Register to hear and determine causes up to Rs. 200/-. The decisions of the Register, however, were not to be *final until the decrees were countersigned by the Judge.* This process was adopted as a matter of caution to prevent any possible miscarriage of justice.

The Collector in the district thus became a very powerful officer, he being at once the Collector, the Judge and the Magistrate. All powers of control in the district passed through his hands. Due to large distances between Calcutta—the seat of the Government—and the districts, the Collectors in practice were uncontrolled and uncontrollable.

From a practical point of view, the result of the differentiation and separation that a Collector was enjoined to observe in the discharge of his various functions was this : for all those functions which he performed as the Collector in the sphere of revenue in the Mal Adalat, he was to be subject to the Board of Revenue and the executive orders of the Governor General in Council ; but in the realm of his judicial functions discharged by him in the Mofussil Diwani Adalat, he was to be subject to the Sadar Diwani Adalat and not to the executive orders of the Government.

The Scheme of 1787 was a retrograde step, a swinging

1. See Page 116, also Chapter. XVII

back of the pendulum. In 1781, a progressive step was taken in so far as a separation between the judicial and the executive functions had been effected. This was a remarkable achievement, which, however, was annulled in 1787.

REFORMS IN CRIMINAL JUDICATURE : 1790

The next instalment of judicial reforms from Lord Cornwallis came in the year 1790. This time the ameliorative measures were adopted in the sphere of criminal law and justice.

The field of criminal law and justice had hitherto been left entirely to the Muslim Law Officers. The shadow of the Nawab's authority was still suffered to exist in this sphere. The Mofussil Fozdary Adalats, established by Warren Hastings in 1772 in the districts, were staffed by the Kazis, Muftis and Moulvies. The Court of Appeal from these Courts, known as the Sadar Nizamat Adalat, originally established at Calcutta in 1772, was shifted to Murshidabad in 1775. This Court used to revise proceedings of the Mofussil Fozdary Adalats, and approved and disapproved of the sentences of death passed by them. The system of criminal judicature was under the superintendence and control of Mohd. Reza Khan who presided over the Sadar Nizamat Adalat in the capacity of being the Deputy of the Nawab.

In 1781, Warren Hastings had introduced a scheme of imperfect government control over the criminal judicature by instituting, what was known as, the Remembrancer of Criminal Courts[1]. This measure, however, was weak and ineffective. The Judges of the Mofussil Diwani Adalats acted as the Magistrates. They were to arrest and apprehend the criminals. In 1787, the magistrates were authorised to try and sentence those who were guilty of minor offences ; others had to be dispatched to the nearest Fozdary Adalat for trial.

The European British subjects residing in the interior of

1. See Page 141-142.

the country could not be tried by the Mofussil Fozdary Adalats. They were to be tried by the Supreme Court of Judicature at Fort William. The Magistrates were, however, authorised to apprehend any European British subject, who might have rendered himself liable to criminal prosecution. After making an immediate inquiry into the circumstances of the charge, if the Magistrate was satisfied that there existed grounds for trial, he was to send such European British subject to the Presidency for trial in the Supreme Court.

The administration of criminal justice during all these years had been at a very low ebb. The system in force was *notoriously defective.* The proceedings of the criminal courts, from the lowest to the highest, were very unsystematic and dilatory. In every district, jails were overcrowded ; corruption was rampant in the courts. Murders, dacoities, and other serious crimes were daily committed with impunity. There was a general feeling that life and property were insecure and inadequately protected.

The sentences passed by the Sadar Nizamat Adalat were final and irrevocable, and were often not even notified to the Governor General, through the Remembrancer of the Criminal Courts, until they had been carried into execution ; and even then, such meagre information as the prisoner's name and nature of the charge, crime and punishment, alone were revealed. Since the grounds of the sentence were not divulged, the Governor General in Council had no means of checking and revising the arbitrary and capricious proceedings of the Nizamat Adalat.

Many of the abuses prevailing in the system of criminal judicature arose directly as a consequence of the *low and inadequate salaries paid to the officers engaged in the administration of criminal justice.* The salaries were insufficient to support the dignity of their office, to enable them to maintain their families with ease and comfort, to keep them above temptation and corruption and inculcate in them a high sense of character, duty, integrity and impartiality. Even the meagre salaries were

not paid regularly. The result was that persons having no education, traditions and character, persons 'unqualified and incapable', persons 'chosen from the dregs of the people, ignorant, artful and unprincipled' came to be appointed as criminal judges—an office of high trust and dignity. It could hardly be imagined that men of family and education would dedicate the whole of their time to so laborious and disagreeable an employment, as the sentencing of persons for crimes, for the mere pittance of salary which could not, positively, afford means of procuring to them more than a bare subsistence, unless some secret motive, some concealed view of advantage, some illegal perquisites, prompted them to accept an office where the reward was disproportionate to the labour involved.

Another cause of malpractices prevailing in the sphere of criminal judicature was the *insecurity of tenure of the Judges.* They could be dismissed at any time. Being uncertain of the length of their service and also of the moment when it would be terminated, these Judges of the criminal courts started collecting money by accepting bribes, so that they might be able to live comfortably, if and when they were deprived of their positions.

The results of this corruption in the criminal judicature of the country were very unfortunate. All sorts of vile crimes were rampant in the country. Murders, robberies and dacoities were committed in the broad daylight with impunity. The prevailing system was dubbed by Shore as a *'mere system of rapine and plunder.'* As one Collector pointed out, 'Nothing has perhaps more contributed to the continuance, if not increase, of dacoity, than the belief entertained by the inhabitants in general, probably on good grounds, of the corruption prevalent in the provincial Criminal Courts, which, if it exists, may be chiefly owing to the scantiness of the principal officer's salary; and nothing is of so much consequence as to remove such an opinion, for dacoits will certainly continue their depredations as long as they believe that with part of their plunder they can procure their exemption from

punishment, and no witnesses will ever appear against them when, from the corruption of the Judge, they believe that their evidence, instead of bringing the offenders to punishment, will only expose themselves to their resentment and to the risk of losing their lives or property.' As the system worked, innocent persons were daily condemned to suffer death, the most cruel mutilation or perpetual imprisonment, whilst the most notorious offenders often escaped with impunity.

Another objectionable feature of the judicial system was the immensity of the power that was lodged in the Judge of the Mofussil Fozdary Adalat in the district. In all cases which did not involve life or limb, the Judge could at once, on his own authority, pronounce the final judgment. In capital cases the proceedings before the Mofussil Nizamat Adalat were forwarded to the Sadar Nizamat Adalat for confirmation of the sentence. That procedure did not constitute any adequate or effective safeguard against wrongful condemnation. If the Judge had any ulterior motive in the case, he could always manufacture the records which he sent to the Sadar Nizamat Adalat for final orders. From the time of their commitment by the Magistrate, prisoners remained in the custody of the Mofussil Fozdary Judge, who alone decided how long they should remain in jails before being brought to trial, what witnesses should be summoned, on what points they should be examined, and in what manner their evidence should be recorded. In these circumstances the power of the Judge was practically unlimited. Owing to the long distances, the Sadar Nizamat Adalat was not in a position to keep a close control over the working of the lower criminal courts. If the Judge so desired, he could pervert the ends of justice without any difficulty or fear of detection. The decision of the Sadar Nizamat Adalat depended entirely on the report that the Judge of the Mofussil Adalat chose to submit, and he could, in consideration of a sizable bribe, manipulate the evidence in such a manner that, when transmitted to the Sadar Nizamat Adalat it would appear to be sufficiently convincing as to procure the prisoner's acquittal or his conviction according as

the Judge desired. For all practical purposes, therefore, the power of the Mofussil Judge was uncontrolled and unrestrained.

The *time taken for disposal of cases* by the Mofussil Courts *was very often inordinately large*. Sometimes, indeed, the delay was due either to the accumulation of cases on the file, or to the difficulty of procuring the attendance of the witnesses. Frequently, however, it was the result of the negligence and venality of the Judge himself. The long interval of time that elapsed frequently between the commitment of a prisoner and the passing of the sentence against him was an evil great in magnitude, resulting from the constitution of the criminal courts. The Magistrate of Dacca adduced an instance of a prisoner in the Fozdary Jail at that place who had been confined for ten years under a charge of murder and upon whom no sentence had been passed. The Magistrate of Bardwan observed that the time consumed between the commitment of the prisoner and the arrival of the final sentence from the Sadar Nizamat Adalat was very uncertain. He quoted instances of its exceeding five years and added, 'that it may with truth be asserted that crimes would be but too frequently committed with impunity did not the magistrate exert his influence to bring the offenders to condign punishment, more particularly as the injured parties when they find they only add to the losses they have sustained by attending the slow process of designed delays in the investigation of the Nizamat Courts relinquish all further prosecution considering their hopes of redress as desperate.'[1]

The delay was attended with the most pernicious effects. Even if the prisoner was at length acquitted he, nevertheless, had suffered all the consequences of a long and painful imprisonment. If he was convicted and sentenced to suffer the punishment due to his crime, the delay defeated the object of his punishment which was to deter others from committing the same crime. For it has been justly observed that punishment should follow the crime as early as possible so that the prospect

1. Cornwallis' Minute, Ben. Rev. Cons. 1790.

of gratification or advantage which tempts a man to commit the crimes should awaken the attendant idea of punishment.

The scandal was not confined to the Mofussil Courts only, for the proceedings of the Nizamat Adalat were often as dilatory. The Magistrate at Dacca reported that there were many prisoners whose trials in the local courts had long been completed, but, though, the proceedings had been transmitted to Murshidabad, the Nazim had not passed final sentences. 'I have been at this station near two years,' wrote the Chitra Magistrate, 'in which time I have apprehended a great number of murderers and robbers, but the Nawab has not to this day thought proper to make an example of any of them, though I have frequently addressed him on the subject.'[1]

In many cases the *punishment* awarded to the prisoners appeared to bear *no relation at all to the nature of the offence.* On the character of the Judge depended to a considerable extent the severity or lenity of punishments. They could be atrociously severe or ridiculously light. The merits of the case were very often but little considered in the determination of a sentence. Murder was the one crime which was less frequently punished than any other crime. This was due to the weakness of the Muslim Law of Crimes. One Magistrate gave it as his opinion that not one man in five hundred who deserved death penalty was executed.

By 1790, Lord Cornwallis was convinced that *the prevailing system for the administration of criminal justice was entirely useless, futile and rotten to the core.* In his opinion there was no civilised country in the world where the system of criminal judicature was in so defective a state as it was in Bengal, Bihar and Orissa. He knew that the regulation of justice in criminal cases constituted one of the most important requisites of good government. He was, therefore, anxious to introduce such ameliorative measures as were necessary for giving the greatest possible efficacy and regularity to the criminal jurisdiction throughout the provinces.

1. Cornwallis' Minute, Ben. Rev. Cons. 1790.

He realised that the prosperity and welfare of the country, as well as the maintenance of law and order, depended on a sound administration of criminal justice. In the absence of efficiency and regularity in the criminal courts and their proceedings, it was impossible to provide any security for life and property.

The *evils* complained of proceeded from *two obvious sources*: firstly, the gross defects of the Mohammedan Law of Crimes[1]; secondly, defects in the constitution of the courts established for trial of offenders.

There were several portions of the Muslim Law of Crimes which, according to Cornwallis, were most evidently contrary to natural justice and the good of society. Some modifications in this field appeared to him indispensably necessary, and he carried them out in 1790[1].

The second question, namely the defects in the constitution of the criminal courts, had been engaging the attention of Cornwallis for some time. In 1789, writing to Dundas, Cornwallis expressed himself thus: 'The administration of criminal justice is oppressive, unjust and beyond measure corrupt, and I see no remedy but by appointing three or four judges for Bengal and Bihar from the Company's senior servants, who should go on the circuit twice a year and superintend the trials, and be particularly careful that the sentences should be executed on those who are found guilty, and that the innocent should be released. Although this will be attended with a considerable addition of expense, yet, whilst we call ourselves sovereigns of the country, we cannot leave the lives, liberty and property of our subjects unprotected.'[2]

With a view, therefore, that the trials of offenders might be conducted with expedition and impartiality, and that the Supreme Government might be enabled to closely superintend the general system, Cornwallis formulated a new scheme which

1. See Ch. XVIII.
2. Melville Papers.

was duly adopted by the Governor General in Council in 1790. This scheme constituted a fundamental departure from the past. The nominal and shadowy sovereignty of the Nawab, which had hitherto lingered on, was no longer to be suffered and tolerated, and was done away with. To ensure prompt and impartial administration of criminal justice, so as to provide security of life and property, Cornwallis arranged for the assumption of the superintendence of the criminal judicature by the Government, instead of the Nawab, who was divested of all his jurisdiction in criminal matters. The responsibility for the administration of this important branch of justice was taken over by the Company's Government to be executed directly through the agency of its own English servants, instead of the Indians, who had hitherto sat in the Mofussil Nizamat Adalats. The Criminal Judicature in the country was placed practically on the same footing as the Civil Judicature had already been since 1772.

THE SCHEME OF 1790

The new scheme to administer criminal justice in the country was promulgated by the Governor General in Council on 3rd December, 1790.

The most important step taken to infuse vitality in the criminal judicature of the country was *to remove the Sadar Nizamat Adalat from Murshidabad to Calcutta. The Nawab was divested of his control over this Court.* Henceforth, this Court also, like the Sadar Diwani Adalat, was to consist of the Governor General and members of the Council as Judges.

In the discharge of their functions in the Sadar Nizamat Adalat, the Governor General and Council were to be assisted by the Chief Kazi of the Province and two Muftis, who were to expound the law applicable to the circumstances of the case pending for decision.

The decisions in the Sadar Court were to be regulated by the Anglo-Mohammedan Law i.e. the Muslim Law as modified by the Regulations of the Governor General in Council.

The procedure to be followed by the Sadar Nizamat Adalat was like this: All trials referred to the Adalat for its final decision by the lower courts (which were to be known as the Circuit Courts) were, in the first instance, reviewed by the Chief Kazi and the Muftis. After due consideration, they were to state whether the *fuṭwa* or sentence proposed in the case by the native Law Officers of the Circuit Court, was consistent with the evidence and conformable to the law.

The statements of cases so reviewed by the Chief Kazi and Muftis, were placed before the Nizamat Adalat. The Court consisting of the Governor General and Council, after a consideration of all the relevant material, was to pass the final sentences.

The Sadar Nizamat Adalat was to meet *at least once* in every week. A regular diary of all its proceedings was to be maintained.

If the Sadar Nizamat Adalat considered a particular prisoner to be the proper object of mercy, it might recommend his case to the Governor General in Council with the recommendation that he be pardoned or that his sentence be mitigated.

The reorganisation of the Sadar Nizamat Adalat would have been of little value had the lower courts of criminal jurisdiction been left in the same old chaotic state. Lord Cornwallis appreciated this fact fully and so he reformed the lower courts also. The former Fozdary Courts presided over by the Muslim Law Officers were abolished, and new courts, known as the *Courts of Circuit*, were established in their place.

The three Provinces of Bengal, Bihar and Orissa were divided into four Divisions, to be known as the Divisions of Calcutta, Murshidabad, Dacca and Patna. Each of these Divisions was to comprise of a few districts.

Each of the four Divisions was to have a *Court of Circuit* to try, hear and determine all criminal offences. A Court of

Circuit was to consist of two covenanted civil servants of the Company as Judges. They were to be assisted by the Kazi and Muftis, who were to be nominated by the Governor General in Council. These native Law Officers were given a security of tenure, the like of which they had not enjoyed before. It was laid down that the Kazis and Muftis could not be removed from their posts except by orders of the Governor General in Council, on proof to his satisfaction of their having been incapable or having been guilty of misconduct.

There were to be *two Gaol Deliveries annually*, beginning from 1st March and 1st October. Each Court was to go on circuit in the Division. *The Court of Circuit was not a stationary but a moving, a circulating Court.* The Court of Circuit was to proceed to the places of residence of the Magistrates in the several districts within the Division. It was to remain at each station till all persons, committed or held to bail for trial by the Magistrate of that station, had been tried and sentenced. After having finished its work in one district, the Court was to proceed to another district in the Division. In this way, the Court was to proceed from district to district in the Division under its care and try the prisoners awaiting their trial.

The Courts of Circuit for the Divisions of Murshidabad, Dacca and Patna, after having completed each circuit, were to fix their residence at Murshidabad, Dacca and Patna respectively and there proceed to try all persons committed or held to bail for trial by the Magistrates of those cities.

The Court of Circuit was to pursue the following procedure while trying the criminal cases :

The charge against the prisoner, his confession, (which was to be received with circumspection and tenderness,) the evidence in favour of the prosecution if he pleaded not guilty, and that which the prisoner might have to adduce, including his defence, were all heard and gone through in his presence and in that of the Kazi and Mufti of the Court ; the Kazi and Mufti were then to write at the bottom of the record of the

proceedings held on the trial, the *futwa* or law as applicable to the circumstances of the case, and to attest the same with their seals and signatures.

The Judges of the Court of Circuit were then to consider the *futwa* very attentively. If it appeared to the Court that the *futwa* was consonant with natural justice, and also with the law, the Court was to approve of the *futwa* and pass sentence accordingly, which was to be executed by the Magistrate.

The proceedings and records of all those cases, where the sentences of death or perpetual imprisonment were to be inflicted, or where the Judges of the Court disapproved of the *futwa* proposed by the native Law Officers, were to be reported to the Nizamat Adalat, which was to award the final sentence.

In the *lowest rung* of the ladder of the criminal judicature were the *Magistrates* in the districts. They had important functions to carry out. The cases which the Courts of Circuit tried were those which the Magistrates placed before them for trial. The success of the new system, therefore, depended on the efficiency with which the Magistrates discharged their functions.

Very elaborate provisions were made to regulate the working of the Magistrates. The *Collector in each district* was to act as the Magistrate. He, on receiving charge of his office, was to take an oath. The duty of the Magistrate was declared to be "to apprehend murderers, robbers, thieves, housebreakers and other disturbers of the peace". The Magistrate was to adopt the following procedure in the discharge of his functions.

Upon a complaint in writing having been preferred to the Magistrate against any person for murder, robbery, and other breach of the peace, the Magistrate was, upon the party complaining taking oath to the truth of such complaint, to issue a warrant under his seal and signature for the apprehension of

the person complained of. The nature of the charge laid against the person was to be specified in the warrant.

Upon the prisoner being brought before the Magistrate, he was to enquire into the circumstances of the crime alleged against him. This examination of the accused was to be without oath and was to be taken down in writing. The Magistrate was also to examine the complainant and other persons who were stated to have knowledge of the crime with which the person was charged. All these depositions before the Magistrate were to be committed into writing.

If after all this inquiry, it manifestly appeared to the Magistrate, that the crime alleged was never committed, or that the suspicion against the prisoner was wholly unfounded, he was to discharge the suspect forthwith.

If the offence committed turned out to be only petty, the Magistrate himself could deal with it and award punishment without any reference to the Court of Circuit. The Magistrate was invested with power to hear and determine all complaints for petty offences such as abusive language, or calumny, inconsiderable assaults or affrays, and to punish the same, when proved, by *corporal punishment, not exceeding 15 rattans, or imprisonment, not exceeding the term of 15 days.*

If it appeared to the Magistrate that the crime committed by the suspect was more serious and that there were grounds for suspecting the prisoner to have been guilty thereof, he was to cause the prisoner to be committed to prison, or held to bail, according to the nature of the crime charged against him, to take his trial at the next sitting of the Court of Circuit. The Magistrate was to bind over the complainant and the witnesses to appear and carry on the prosecution.

Persons suspected of having committed murder, robbery, theft and house breaking were not to be admitted to bail.

The Magistrate, on receiving notice of the time when the Judges of the Court of Circuit were expected to arrive at the station, was to give public notice in his district requiring

all persons discharged on bail, and all prosecutors and witnesses to appear and to attend by the date fixed for the arrival of the Court of Circuit.

On the arrival of the Judges of Circuit, the Magistrate was to deliver them a calendar of all persons committed to prison, or held to bail for trial, with copies of the charge preferred against them, the depositions of the witnesses, together with all other proceedings held by him previously. He was also to lay before the Judges of Circuit, separate lists of all persons apprehended but discharged for want of sufficient evidence, with their original proceedings in all cases.

The Magistrate was to make monthly reports to the Sadar Nizamat Adalat specifying the persons apprehended, their names, dates of apprehension, and the orders passed thereon.

All persons, Europeans as well as Natives, not being British subjects, were amenable to the authority of the Magistrate and the Courts of Circuit. The European British subjects were amenable to the Supreme Court for their crimes and not to the Magistrates and Courts of Circuit. To obviate the ill consequences which might result from the exemption in favour of the European British subjects remotely situated from Calcutta, the Magistrates were required to qualify themselves by oath, taken before one of the Judges of the Supreme Court of Judicature to act as Justices of the Peace.[1]

Cornwallis suggested payment of liberal salaries to the various Judges and Officers engaged in the administration of

1. Following rules were enacted for the apprehension and conveyance to Calcutta of the European British subjects, who rendered themselves liable to criminal prosecution in the Supreme Court: The Magistrate on the information lodged on oath, was to apprehend such British subject, and after making without delay, such an inquiry into the circumstances of the charge, as to satisfy his own mind of there being grounds for trial, he was immediately to dispatch such person in safe custody to the Presidency, there to be delivered over to one of the Judges of the Supreme Court. On this occasion, the complainant with his witnesses must also give security to repair to the Presidency on or before the beginning of the trial, to prosecute the accused. In case these persons, due to their poverty, were to be unable to defray the charges of their journey, the Magistrate was to report the same to the Government.

criminal justice, otherwise 'it cannot be expected that men of character, and ability will continue in these offices.' Liberal allowances were proposed so that 'their necessities may not influence them to a deviation from the line of their duty.'

The new scheme of Criminal Judicature was expected to entail an additional expenditure of Rs. 1,38,460/- per year. Cornwallis pointed out that it had been his constant object to make every reduction of the public establishments that could be effected with *propriety*, but he went on to observe: 'I need not remark that *the strongest conviction of the necessity of these arrangements could alone induce me to propose any addition to them* at the present period when our resources are required for the support of a foregoing war. But *it is bad economy* at any time to withhold the sums requisite for the *support of the establishments necessary for the administration of justice.*'

The new scheme was expected to produce happy results in suppressing crimes and affording security of life and property. Most daring robberies and other enormities were daily committed throughout the provinces and it was requisite to put a stop to these disorders. The new establishments of Courts of Circuit under the superintendence of the English Judges were expected to deal with the criminals in an effective but impartial manner. There was every reason to hope that 'the murders, robberies and other criminal offences, will not be more frequent than must necessarily be expected from the vices and passions to which human nature is subject, and which under the best regulated government will always impel some individuals to commit the worst of crimes.'

The introduction of the new Criminal Courts marked the abolition of the last vestiges of the Nawab's sovereignty. The administration of criminal justice which had hitherto been confined to the Muslim Officers working under the supervision of the Nawab's Deputy, hereafter, fell completely in the hands of the English servants of the Company. In the

new scheme no Indian officer except the Kazis and Muftis held any responsible post.

The new scheme was based on the *principle of checks and balances*, so that there might be no room to doubt the trials being conducted with ability and impartiality. The Magistrates were to discharge important functions but subject to the control of the Courts of Circuit. The Courts of Circuit were to try all criminal cases, but in serious offences meriting death sentence, final orders were to be passed only by the Nizamat Adalat.

Lord Cornwallis had taken every care to see that the new criminal judicature provided even-handed justice to all in criminal cases and he thus extended adequate security of life and property to the individuals.

ADMINISTRATION OF CIVIL JUSTICE—DEFECTS OF THE SCHEME OF 1787—NEED FOR A CHANGE

In 1793, Lord Cornwallis introduced his last instalment of judicial reforms in Bengal, Bihar and Orissa. The new judicial plan contained many radical innovations. It was a definite break from the past in many respects. The scheme of 1793 is a standing testimony to the maturity of judgment, the breadth of outlook and the liberality of vision and conception with which Cornwallis approached the task of judicial re-construction in the last year of his governor-generalship in India. This scheme forms the high water mark in the whole of the Indian Legal History. This scheme was based on certain postulates which to-day the civilized countries regard as essential and fundamental for the organization of the Judicature.

Going back to the scheme of 1787, one would find that *the Collector in the district had been entrusted with very vast powers*. He exercised practically unlimited authority, without any effective restraint and control from above—it being almost impossible to have any such control in those days of inadequate means of communication. The scheme of 1787 marked the culmination of the powers of the Collector; all

strings of control in the district passed through his hands. The most important feature of the system was the combination of revenue administration with the dispensation of justice in one and the same person—the Collector. As a result of this fusion, the Collector secured unprecedented powers. As it stood, nothing but the character of the Collector was any real safeguard to the subjects, and a system which depended only on the personal qualification and character of the individual appointed to execute it, could hardly be healthy and sound.

In course of time, Lord Cornwallis came to realise that there was no class of men whom the Government should watch with greater care, vigilance and jealousy, and on whom the Regulations should have a stricter control, than the officers entrusted with the function of collecting revenue. Such an extensive trust for one single person provided every chance and inducement for its misuse and abuse. Such a system could not be allowed to remain in force for long. It could never form a permanent feature of any country's administrative apparatus. There were inherent in it, seeds of decay, degeneration and oppression. It was due to these considerations that Cornwallis came to the conclusion that the Courts of civil justice 'are in a state which calls aloud for remedy.....'

It was Cornwallis' considered opinion that it was a mistake to combine administration of revenue with that of justice. In 1793 he could say, 'The vesting of the collection of revenue and the administration of justice in the same person... ...has perhaps contributed more than any other cause to retard the improvement of the country.....'

The Collectors did not discharge their judicial functions *efficiently*. They always regarded their *work of collecting revenue as primary, and the task of administering justice only secondary*. The Collector devoted all his energy and time to his main assignment of the collection of revenue. He knew that his failure or success as an administrator depended solely on the efficacy with which he discharged the revenue work. All

salaries and emoluments were annexed to the office of the Collector of revenue. He received no salary as the Judge of the Adalat of his district. He received a commission on the amount of the collections of revenue. His functions in the capacity of the Collector were constantly and continually open to inspection. The monthly reports made by him of the state of collections drew the attention of the Government. His actions were commended or censured according as his revenue collections were good or bad. But so far as the work of deciding civil causes was concerned, the Government did not have any direct, apparent stake in the matter and so his failure or neglect to discharge this work efficiently or diligently was seldom brought to public notice; and when observed, the multiplicity of duties the Collector had to perform was a plausible plea for any delay or default in the administration of justice.

The collection of revenue on which the Collector's promotion, credit and future career so much depended, naturally came to be regarded as the *chief and foremost duty*. The office of the Judge was regarded merely as an appendage to that of the Collector. The obvious result was that judicial work gave way, stood still or was at least suspended, whenever it interfered with the revenue work. The Collector could not be blamed on that account. Such was the predicament in which he found himself placed, that he must either prefer his revenue duties, or risk both his reputation or fortune. Neither his exertions nor his omissions in his capacity of Judge met the public eye; but the least failure in realizing the revenue was immediately noticed, and subjected his character to imputations, besides occasioning a diminution in his commission.

The results of such a system were unfortunate. The duties of the Collector in other spheres rendered it impossible for him to discharge adequately the trust of administering justice. He performed his judicial business often in a summary, irregular and unsatisfactory manner. The business of the Diwani Adalats was much neglected. Thousands of cases were left undecided every year, the greater part of which

remained pending for years. The Collectors had no time to attend to the judicial work and so many years often elapsed before suits were brought to a decision. Such a delay was ruinous to the suitors, defeated the ends of justice, and struck at the very roots of the prosperity of the country.

Apart from the responsibility to collect revenue, the Collector also took cognisance of cases arising out of public revenue ; and sat for this purpose in the Court of Mal Adalat in the district. The Mal Adalats where important matters relating to the revenue involving the rights of all the various descriptions of landholders and cultivators of the soil were tried, scarcely merited the appellation of courts of justice. All complaints for oppressions and undue exactions in the collection of the revenue whether made by any Collector or other person whatsoever were to be cognisable only by the Collector himself. As the system operated, the Collector himself was the Judge in his own causes. If the Regulations for assessing and collecting the public revenue were infringed, the Revenue Officers themselves must be the aggressors, and the individual who had been wronged by them in one capacity, could never hope to obtain redress from them in another capacity. The landholders and farmers were very well aware of the weakness of the Collector for collecting revenue, and so they invariably brought forward the alarm of the failure of revenue to deter the Collector from listening to complaints against their exactions. The zemindars oppressed the ryots with impunity for they knew fully well that the Collector would be inclined to overlook the oppression in his anxiety to fill the treasury. The undertenants of the zemindars, who were well acquainted with the predicament in which the Collector was placed, instead of considering him as an impartial judge, looked upon him as a party against them from whom they expected no redress. *Every thing was rendered subservient to the collection of revenue.* 'As it cannot be supposed that those who are most likely to commit or connive at acts of injustice will afford redress against themselves, nothing can be more preposterous than to give the exclusive cognisance of all disputes between

the proprietors and the cultivators of the lands to the Collectors of revenue.' The powers of the Collector and his officers were dreaded by the ryots. These officers were under no control on the spot and against their exactions and oppressions no effective redress was available. The authority vested in the Collector excited terror in the minds of the people. It rendered landed property of little value. Lord Cornwallis declared, 'I do not hesitate to pronounce that whilst this order exists, improvement is not to be hoped for; and that the Regulations which we are daily framing to promote the cultivation of the country, and to raise the value of the landed property will be scarcely known and still less felt by the body of the people.'[1]

Cornwallis was definitely of the opinion that the Collectors should be confined exclusively to the function of collecting revenue and that they should cease to have to do anything with the decision of revenue cases. It was essential that all causes arising out of public revenue should be decided by persons uninterested in the collection of revenue so that they could be expected to act impartially and fairly, and thus afford adequate protection to the ryots.

Not only this, he was also of the opinion that *to prevent the abuse of power by the Collectors and other executive officers of the Government, the Courts of Justice should be ready to punish oppressions and exactions,* and the people must be certain that the remedy would be effectual and decisive and that it could be expeditiously obtained. The executive officers were henceforth to exercise their powers at their peril. The reasons necessitating such a proposition, in Cornwallis' own words, were: 'The idea of the....officers of Government of being able to commit oppression with impunity must be eradicated. The people will then feel themselves secure in their persons and property, and a spirit of industry will animate both the manufacturer and cultivator of the land....'

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1. Cornwallis' Minute. Beng. Rev. Cons. 1793.

Lord Cornwallis realised fully well that the prosperity and progress of the country depended much on the security and protection that the people enjoyed in respect of their property and persons. He realised that the security and protection of person and property could not be had until there was an effective administration of justice in the country. An effective administration of justice was not possible under the scheme of 1787. He was convinced of the futility of that system. He, therefore, took steps to introduce a new scheme in 1793. The new judicial plan was based on the following postulates.

1. The Executive Officers were to *be divested of judicial powers* ;

2. The function of administering justice was to be vested in persons distinguished by their integrity and ability. *The dispensation of justice was to be their sole duty,* their attention not being distracted by any other public occupation ;

3. The business of deciding revenue cases also was to be assigned to the Courts of Justice. The Collectors of revenue were no longer to enjoy any judicial powers in any shape or form ;

4. *The Executive Officers were to be placed under the jurisdiction of the Courts of Justice,* which could scrutinise their actions and award suitable redress if they infringed the Regulations, or abused or misused the powers conferred on them by the Regulations.

In the new scheme the Executive was not only separated from the Judiciary, but was also placed under the jurisdiction of the latter in so far as it might act in breach of the Regulations. In this way the principle of 'Rule of Law' and 'Administration according to Law', or in other words the 'Sovereignty of Law' was definitely transplanted in the country.

SCHEME OF 1793 : SEPARATION OF EXECUTIVE AND JUDICIARY

The policy of divesting the Collectors of all judicial duties including those of deciding revenue causes was given

effect to by Regulation II of 1793, which abolished the Courts of Mal Adalat or Revenue Courts, transferred the trial of the suits, hitherto cognisable in those courts, to the Courts of the Diwani Adalat and prescribed rules for the conduct of the Collectors. The new policy indicated a radical departure from the past. Since 1772—the day when the Company took upon itself the administration of the Diwani functions—revenue cases had always been within the cognisance of the Collectors of the Revenue. It was for the first time now in 1793 that the business of deciding revenue cases was transferred to distinct tribunals which had nothing to do with the collection of revenue.

The preamble of the historic Regulation summarised the reasons which had led the Government to undertake this radical reform. Measures were necessary to effect improvements in agriculture; all questions between Government and land-holders respecting the assessment and the collection of the public revenues, and the disputed claims between the latter and their ryots, or other persons concerned in the collection of their rents, had hitherto been cognizable in the Courts of *mal adalat*, or revenue courts ; the Collectors presided in these courts as judges, and appeals lay from their decisions to the Board of Revenue, and ultimately to the Governor General in Council. 'The proprietors can never consider the privileges which have been conferred on them as secure, whilst the revenue officers are vested with these judicial powers.' The proceedings of these courts were irregular, summary, and often *ex parte* ; the Collectors had to suspend the exercise of the judicial functions whenever they interfered with their financial duties. It was obvious that if the Regulations for assessing and collecting the public revenue were infringed, the revenue officers themselves must be the aggressors, and that individuals who had been wronged by them in one capacity, could never hope to obtain redress from them in another. Their financial occupations disqualified them for administering the laws between the proprietors of land and their tenants.

To remedy these defects, the preamble stated, the revenue officers must be deprived of their judicial powers ; all financial claims of the public, when disputed under the Regulations, must be subjected to the cognizance of courts of judicature....

Accordingly, the above-mentioned Regulation made, *inter alia*, the following provisions :

1. The collection of revenue payable to the Government in each zilla was to be committed to a civil covenanted servant of the Company to be known as the Collector ;

2. From May 1, 1793, the Courts of *Mal Adalat*, or Revenue Courts, were to be abolished. The trial of suits which up to this time had been cognizable in those Courts, 'as well as all judicial powers heretofore vested in the Collectors of the revenue' were to be transferred to the Courts of Diwani Adalat.

In this way, the distinction between revenue causes and civil causes was abolished. No revenue officer was henceforth to exercise any judicial powers.

DIWANI ADALATS REORGANISED

Having thus separated the judicial and revenue functions, and having confined the Collectors to their executive functions exclusively, the next step taken was to reconstitute the Courts of the Diwani Adalat in the mofussil. There was need for making these Courts more efficient and independent. This purpose was achieved by Regulation III of 1793.

The preamble to the Regulation stated the new policy and the reasons which led the Government to adopt it in these words : the Government by its Regulations had conferred many valuable privileges and immunities on the natives of Bengal, Bihar and Orissa, viz. preserving their indigenous laws, protecting them in the free exercise of their religion, affording them security to their persons and property ; benefits derived from these Regulations would not be complete, 'unless the

judicial establishments for dispensing those Regulations are framed upon principles which will render them the means of protecting private rights and property....'

The preamble continued : to ensure to the people, as far as practicable, 'the uninterrupted enjoyment of the inestimable benefit of good laws duly administered', the Government had decided—(a) to divest itself of the power of interfering in the administration of the laws and regulations in the first instance, reserving only, as a court of appeal or review, the decision of certain cases in the last resort ; and (b) to lodge its judicial authority in courts of justice, the judges of which should not only be bound by the most solemn oaths to dispense the laws and regulations impartially, but be so circumstanced as to have no plea for not discharging their high and important trusts with diligence and uprightness.

The Regulation achieved the above-mentioned objectives by making the following provisions :

1. A Court of Diwani Adalat was instituted in each district in the three provinces of Bengal, Bihar and Orissa, and in each of three cities of Patna, Murshidabad and Dacca.

2. Each Court was to be superintended by a covenanted civil servant of the Company. Each Judge was to subscribe to a prescribed oath.

3. All natives and other persons, *not British subjects*, were amenable to the jurisdiction of the Diwani Adalat.

4. The Court of Diwani Adalat was authorised to take cognisance of all *suits and complaints of a civil nature and causes relating to revenue.*

5. The Court was not to interfere in cases of criminal nature.

6. As usual, the Court of Diwani Adalat was to apply Hindu or Mohammedan Laws to Hindus or Muslims respectively in cases relating to marriage, inheritance, caste and other religious usages and institutions. In other cases for which no

specific rule existed, the Judge was to act according to justice, equity and good conscience.

7. Certain provisions were made to render the Court of Diwani Adalat regular and efficient. No rule, order, proceeding or decree was to be made, but on court days, and in the open court. No Judge was to correspond by letter with parties in causes pending before him. If a party in a suit or any person amenable to the jurisdiction of the Court, had any matter to represent to the Court, he was either to appear in person and represent the matter in writing, or was to make the representation in writing through an authorised vakeel.

Regulation IV enacted the rules which the Court of Diwani Adalat was to observe for receiving, trying, and deciding suits or complaints cognizable in it.

EXECUTIVE SUBJECTED TO JUDICIAL CONTROL

The one very important proposition that Cornwallis had put forth as the basis of the reforms of 1793 was *to subject the Collectors to judicial control.* The Collectors—and for the matter of that all executive officers of the Government—were henceforth not only to be divested of judicial power, but were also to be amenable for their acts to the Courts of Judicature. The Collectors were to collect the public dues subject to a personal prosecution for every exaction exceeding the amount which they were authorised to demand on behalf of the public, and for every deviation from the Regulations prescribed for the collection of it. All executive officers of the Government were to be amenable to the Courts for acts done in their official capacity in opposition to the Regulations.

This policy was put into effect by section X of Regulation III of 1793. It ran, 'Collectors of the revenue, and their assistants and native officers, commercial residents and agents, and their agents and native officers employed in the provision of the investment, salt agents, and their assistants and native officers concerned in the manufacture of salt, the Collectors of the customs, and their assistants and native officers employed in the collection of the customs, the mint and assay masters,

and their assistants and native officers, are declared amenable to the Zilla or City Court[1] in the jurisdiction of which they may reside, or carry on the public business committed to their charge, for any acts done in their official capacity, in opposition to any regulation....'

Evidently this was a very important and remarkable development in the Administrative System of India. Hitherto, the revenue officials had not been amenable to any Court of Justice for acts done by them in their official capacity. If they committed any oppressive acts, the injured party had no means of obtaining redress except the very uncertain, dilatory and unsatisfactory method of petitioning the Board of Revenue or Governor General in Council. Such petitions were generally sent back to the Collector for his report, but obviously, an impartial inquiry and report could not be guaranteed if the complaint was against either himself or his subordinates. Yet upon these reports orders were passed. If the Collector or his subordinates were censured and dismissed, the satisfaction to the complainant was slight, and no security against the repetition of oppressive acts was obtained. There was always a danger that the Regulations of the Government would be transgressed by the officers of the Government who being servants of the State were apt to consider themselves above the Regulations and used their authority for the purposes of oppression. There was no security of person and property under such a system. Now, for the first time in the history of British India a Government Regulation laid down *the principle of the sovereignty of law.* Under Sec. X of Regulation III, the Collector was to be amenable to the Courts for acts done by them against the Regulations. The Collector was to be liable to pay damages to the injured party. This change in the system, hoped Cornwallis, 'will effectually prevent, in future, the tyranny and oppression which has been so frequently exercised throughout the Country by native officers employed in the collections, and compel the Collectors to adhere

1. i.e. Courts at Patna, Dacca, Murshidabad.

strictly to the Regulations and instructions prescribed for their guidance.'

Under Sec. X, Reg. III, not only the Collectors but also all executive officers of the Government were to be amenable to the Courts for their official acts and be liable personally for violations of the Regulations.

BRITISH SUBJECTS VS. THE COMPANY'S COURTS

The British subjects residing in the interior parts of the country for commercial purposes, might recover with facility, and at a moderate expense, their claims upon the natives, or other inhabitants of the Company's territory who were amenable to the Courts of Diwani Adalat, by instituting a suit against them in the Courts of the zilla or city in which they resided. The natives of the country, however, had no reciprocal means of obtaining redress against such British subjects, because they were amenable only to the Supreme Court of Judicature at Calcutta, and to obtain redress against them the suit had to be brought in that august body. The natives, with whom the British had extensive dealings, in fact, suffered much as a result of this arrangement. They were precluded practically from all redress in the event of their being wronged by the British, as it was obviously impracticable for the generality of persons to quit their families and occupations, perform a journey probably of several hundred miles, to sue for small demands in a Court, proceeding and deciding according to laws and in a language with both of which they were unacquainted, and at an expense that the opulent only could afford.

The situation was very inequitable. To provide to the British subjects the benefit of local courts in recovering what was justly due to them from the native inhabitants, without being themselves bound to observe and fulfil the claims due to the natives, was manifestly inconsistent with the ends of justice. In the words of Cornwallis, 'to render the remedy of the weak against the strong so difficult, whilst the

former are enabled to obtain redress against the latter with such facility, is both unjust and impolitic.'

To redeem this situation, Section IX of Regulation III of 1793 provided that the Courts of Diwani Adalat would have jurisdiction over all British subjects, *so far as not to allow them to reside at a greater distance from Calcutta than ten miles*, unless they executed a bond to render themselves amenable to the Courts in all suits of a civil nature that might be instituted against them by the natives, in which the amount claimed did not exceed *five hundred rupees*.

This provision was very valuable to the natives in so far as it provided them with a sort of security against the oppressions of British subjects. It may, however, be noted that if the value of the claim against the British subject exceeded five hundred rupees, it could be instituted only in the Supreme Court and not in the Company's Diwani Adalat.

THE GOVERNMENT AND THE COURTS

Cornwallis went even further. All disputes between the Government and individuals were to be placed before the Courts for scrutiny and determination. He proposed, 'where Government is a party with its subjects regarding property, it should submit its rights to be tried through the medium of its officers in the courts of justice'. This object was achieved by Regulation III. In its preamble, it was stated that the 'Government itself, in superintending these various branches of the resources of the state, may be precluded from injuring private property, they have determined to submit the claims and interests of the public in such matters, to be decided by the courts of justice according to the regulations, in the same manner as suits between individuals'. Section XI of the Regulation conferred this privilege of bringing actions against the Government on all those who thought themselves injured and aggrieved under the Regulations enacted by the Government.

COURTS OF APPEAL

Hitherto, appeals from the Courts of Diwani Adalat used

to lie to the Sadar Diwani Adalat at Calcutta in all cases over Rs. 1000. There was no other tribunal nearby to which the parties could go for redress if they thought themselves aggrieved by the decisions of the Diwani Adalats. The system was very inconvenient. Individuals residing in the interior parts of the country were thus required to travel long distances to proceed to Calcutta to prosecute the appeals. Moreover, they had to engage a vakeel at a heavy expense for the special purpose of prosecuting an appeal before the Sadar Adalat. In addition to this, they had to incur other authorised charges and expenses which necessarily attended the carrying on a law process in a Court situated at so great a distance. The result of all this was that many persons in weak financial position, or those whose pre-occupation prevented their travelling to Calcutta in person, had to submit to the decisions of the Diwani Adalats by which they deemed themselves injured and had to go without any appeal even in those cases which were appealable. It was, therefore, very necessary *to institute some intermediary Courts of Appeal, in between the Sadar Diwani Adalat at the top, and the Courts of the Mofussil Diwani Adalats at the bottom,* so that persons considering themselves injured by the decrees of the lower courts might have an appeal to a respectable court almost on the spot.

Moreover, the great distance rendered it impossible for the Government and the Sadar Diwani Adalat to control the conduct of the Judges of the Mofussil Diwani Adalats. The establishment of the proposed additional Courts of Appeal was bound to obviate this defect also.

In addition to these evils arising from the local situation of the Sadar Diwani Adalat, the Court being composed of the Governor General and members of the Council, could not sit regularly ; they could not dispose of judicial business expeditiously as they were busy in other matters of State. Moreover, it was necessary to restrict appeals to the Sadar Court so as to prevent a greater number of appeals coming before it than the general administration of public affairs made it possible for the Governor General and his Council, to hear and dispose of.

Before 1793, therefore, all decisions of the Courts of Diwani Adalats were final up to Rs. 1000. In this way, a large number of suits instituted in the Diwani Adalats were not appealable ; many persons, whose claims did not exceed rupees one thousand—and they were usually poor people—were practically forced to remain content with what the Mofussil Courts had decided in their cases, and many a time, these decisions happened to be erroneous and unjust.

In 1793, the jurisdiction of the Diwani Adalats had been enlarged so as to cover not only civil causes, but also revenue causes and suits against public officers and the Government. It was, therefore, thought expedient, in the interest of prosperity of the country, 'that all persons, especially the cultivators of the soil, the traders, and manufacturers, and other classes of the lower and most industrious orders of the community in the different parts of the provinces, who may be dissatisfied with the decisions of those courts, should have an appeal to a higher court to which they can have ready access ; and that this court should be so constituted, that they may look up to it with confidence for speedy redress against unjust and erroneous decisions.' The intermediary Courts of Appeal were to provide security to the Government for due execution of the Regulations. They were to act as the *barriers* to the rights and property of the people, who would thus come to have a general confidence in the efficacy and effectiveness of the country's judicial system.

Regulation V of 1793, therefore, instituted four Provincial Courts of Appeal, which were to have their seats at Patna, Dacca, Calcutta and Murshidabad.

Each Court was to be superintended by three English Judges, being the civil covenanted servants of the Company.

The functions of these Courts of Appeal were :

(a) To try such suits as should be transmitted to them for the purpose by the Government and the Sadar Diwani Adalat.

(b) To receive original suits or complaints which a Judge of the Court of Diwani Adalat might have refused to receive or proceed in, and to cause such Judge to hear and determine the same.

(c) To receive charges of corruption against the Judges of the Diwani Adalats, and to forward them to the Sadar Diwani Adalat and to report to the same Court whenever it should appear to them that any Judge of the Diwani Adalat had neglected his duty.

(d) To receive and try appeals from the Diwani Courts within their territorial sphere, if preferred within three months. *All decisions of the Diwani Adalats, irrespective of any monetary value, were to be appealable to the Provincial Courts of Appeal.*

The suitors thus secured a general right of appeal, whereas, formerly, only suits involving at least Rs. 1000 could be taken to the Sadar Diwani Adalat.

The decrees of the Provincial Courts of Appeal were to be final in all cases involving one thousand rupees or less.

At least two Judges were to hold the Court.

Many other ancillary provisions were made to ensure regular and proper working of these Courts of Appeal.

The Provincial Courts of Appeal were to act not only as appellate courts, pure and simple, but were also to exercise some supervisory functions over the Diwani Adalats. The view of Cornwallis was to make these Courts very respectable in the esteem of the people. The offices of the Judges of these Courts were to be regarded as the first in importance in the civil line. Person selected to fill them should be distinguished for their integrity, ability, and knowledge of the manners, customs and languages of the natives. These Courts, it was hoped, would give security to property and afford protection to the people ; and their weight and influence was expected to contribute greatly to the vigour and stability of the internal Government of the Country.

THE SADAR DIWANI ADALAT

As usual, the highest Court in the judicial hierarchy was the Sadar Diwani Adalat, which had already been in existence since 1772. This Court was to consist of the Governor General and members of the Council as Judges. The main functions of the Court were two, viz, to receive appeals from, and to watch and superintend the functioning of, the lower Courts.

The Sadar Diwani Adalat was *to hear appeals* from the newly constituted *Provincial Courts of Appeal in all cases where the subject matter involved exceeded one thousand rupees.* The decisions of this Court were final in all suits, subject to the right of appeal, as conferred by the Act of Settlement 1781, to the King in Council in all cases of a value of, or exceeding £5000.[1]

The powers of the Sadar Diwani Adalat in relation to its functions of supervision, inspection and control of the lower Courts were to be as follows :

(a) It might receive any original suit or complaint 'which may be cognisable in any Zilla or City Court', and command the Judge of such Court to hear and determine the same. This could be done if the party concerned satisfied the Sadar Court that the particular Judge of the Mofussil Diwani Adalat refused or omitted to proceed in it, and that the complainant then applied to the Provincial Court of Appeal of the Division and that such Court also omitted or refused to give him any relief.

(b) It was authorised to receive any appeal from the decision of the Mofussil Diwani Adalat, 'which may be cognisable in any Provincial Court of Appeal,' and direct such Provincial Court of Appeal to receive the particular appeal and proceed to hear and determine it, provided the party satisfied the Sadar

1. See page 116

Court that the Provincial Court omitted or refused to receive or proceed in it.

(c) It was authorised *to receive charges of* corruption against the Judges of the Mofussil Diwani Adalats or the Provincial Courts of Appeal. The Sadar Court could itself try the charge; if the charge be against the Judge of a Mofussil Diwani Adalat, the Sadar Court might order the Provincial Court of Appeal to try the charge ; if the party accused happened to be a Judge of a Provincial Court of Appeal, the Sadar Court might issue a special commission to three or more Judges of the other Provincial Courts, to try the charge; or the Sadar Court might request the Governor General in Council to prosecute the party accused in the Supreme Court of Judicature.

If the charge was established, the Governor General in Council might either remove such Judge from his office, or suspend him from the service of the Company, or might pass such orders as 'may appeal to him proper'.

Undoubtedly, the functions of supervision and inspection over the lower Courts, exercised by the Sadar Diwani Adalat, were very necessary to keep the Judges of the lower Courts in the straight and difficult path of administering law and pure justice effectively, efficiently and impartially.

Regulation VI of 1793 made many other procedural rules to enable the Sadar Diwani Adalat to discharge its functions properly and regularly.

SUBORDINATE CIVIL JUDICATURE

It would have been practically impossible for one Court of Diwani Adalat in a district to cope with the bulk of business arising there. The District Judge was an English servant of the Company; it was expedient, therefore, that he did not consume the whole of his time in petty cases at the cost of cases of importance. To save the District Diwani Adalat from being congested with work of a petty nature, it

was requisite to divert petty causes to some subordinate judicial agency in the district so that the District Judge might be better able to attend to suits of importance and magnitude without much delay.

Moreover, only one Court in a district would have been very inconvenient to a large number of persons living in the interior, far from the seat of the Adalat, who must travel long distances in quest of justice, in all sorts of cases—major as well as minor—thus wasting much time and energy. Concentration of tribunals at one point in the district could not have possibly met the needs of the people. What was needed was a system of subordinate Courts interspersed throughout the district. Cornwallis paid due attention to this aspect of judicial organisation. Regulation XL of 1793 made provisions in this respect. In the preamble of this Regulation, the following reasons for the creation of a subordinate judiciary were cited :

'There being but one established tribunal in each Zilla for the trial of causes, the parties in the most trivial suits, wherever they may reside, are often obliged to repair in person to the place at which the court is held, and to attend on it until the suit is decided. Besides the expense and inconvenience necessarily resulting to the parties themselves from quitting their employments, and proceeding to a distance from their habitations, greater hardship is experienced by their witnesses, who, notwithstanding they may be uninterested in the issue of the suit, are obliged, excepting in particular cases, to attend the court in person, to the great detriment of their private affairs. In addition to these evils, the numerous petty suits filed both in the city and the zillah courts occupy the greater portion of the time of the judges, protract the decision of causes of more importance, and obstruct the general administration of justice. To relieve the courts, as far as may be practicable, from the trial of these petty suits, to afford the parties an opportunity of obtaining an adjustment of them, without subjecting themselves or their witnesses to the injurious consequences above stated, and to expedite the decision of

causes of every description,' it was necessary to institute some subordinate courts.

Thus to bring justice near the homes of the people, and to promote the speedy administration of justice generally, *Commissions were to be issued to certain individuals authorising them to try and determine suits not exceeding fifty rupees in amount or value.* The Commissioners were to be known as Munsiffs. No Commissioner was to be removed from the office during the period his commission 'may be declared to be in force', without sufficient cause being proved to the satisfaction of the Sadar Diwani Adalat.

The number of Commissioners to be selected in each zilla was to be such that no defendant might be under the necessity of going, wherever he might reside, to a greater distance than five coss to answer any suit preferred against him.

The Commissioners were to be selected out of land-holders, farmers, tehsildars etc.....

Suits could be instituted directly before the Munsiffs. The Munsiffs were not to have authority to execute their own orders or decrees. They had to submit their proceedings to the District Diwani Adalat, which alone could execute their orders. These provisions had been made with a view to provide against miscarriage of justice and abuse of judicial powers by the Munsiffs.

All decisions of the Munsiffs were appealable to the District Adalat, a second appeal lying to the Provincial Court of Appeal.

As these Munsiffs were not lawyers their decisions were to be set aside not for want of form or irregularity, but on merits only.

The Commissioners were punishable by the Sadar Diwani Adalat for corrupt, oppressive or unwarranted acts.

These Munsiffs did not constitute any regular salaried service of the Company. They were *honorary Judges*, who

received no remuneration for discharging these judicial functions. The scheme of 1793 did not allow Indians to act as District Judges. All such judicial offices were to be filled by the English. It was only as Munsiffs that the Indians could exercise any judicial functions. The Indian could not, therefore, take cognisance of any civil suit beyond the limit of fifty rupees.

The institution of Munsiffs was useful and beneficial. Their Courts, interspersed as they were throughout the district, obviated the necessity of the people travelling long distances to secure justice in suits of small value. The absence of these courts would have amounted to a denial of justice to a bulk of the population, which neither had the capacity nor the inclination to spend time, money and energy in undertaking long and arduous journeys, along with witnesses, not once but, perhaps, several times. These Courts mitigated congestion in the main District Court, which, otherwise, would have been overwhelmed with judicial work of a petty nature.

A defect in this arrangement was the honorary character of the Munsiffs which rendered them susceptible to corruption and bribery.

Further, the selection of Munsiffs was to be confined only to landholders, land farmers or their agents. Even though it had been realised that 'the proprietors can never consider their *privileges* which have been conferred on them as *secure*, whilst *the revenue officers are vested with these judicial powers*,' it appears to be somewhat paradoxical, as to why the vesting of judicial powers in the zemindars was not regarded as objectionable on the same score. Vesting of judicial powers in the land-holders was inconsistent with the basic postulates on which the scheme of 1793 was based, and due to which the Collectors had been deprived of their judicial powers.

It is true that it was necessary to establish subordinate civil courts in the interior of each district. These courts could not possibly be staffed by Englishmen or the regular servants of the Company. Considerations of cost ruled out such a possibility. So it became necessary that Indians of authority

and integrity should have judicial powers to dispose of petty civil cases. But, why were such powers vested exclusively in the zemindars? Perhaps, the Government was induced to adopt this course because of its desire to strengthen the hands of zemindars so that they might have adequate powers to realise the rent expeditiously from their tenantry. The idea of placing the zemindars in a position of authority over their tenantry, so as to enable them to discharge their revenue obligations punctually, led the Government to co-ordinate the land-holders in the scheme of administration of civil justice even though it was inconsistent with the basic propositions.

REGISTRAR'S COURT

Each Court of Diwani Adalat was to have an establishment of ministerial officers. Each Court was to have a Registrar or Register, who was to be a covenanted servant of the Company. To avoid congestion in the Court, to prevent the time of the Judge from being consumed in petty suits, and, consequently, to enable him to attend to suits of importance and magnitude with greater expedition, Section VI of Regulation XIII of 1793, empowered the Judge of the Diwani Adalat to authorise the Registrar of the Court *to try and decide suits for money or personal property up to a value of two hundred sicca rupees, or of malguzary land the annual produce of which did not exceed two hundred sicca rupees.*

The Registrar was to sign the decree passed by him. The decree was also to be countersigned by the Judge to denote his approbation of it, and the decree was not to be considered valid unless it was so countersigned.

COURT FEES ABOLISHED

Cornwallis was too anxious to throw open the gates of courts to all. He, therefore, removed many restrictions on litigation, the most conspicuous of which was the deposit of court fees.

Sections 44 and 45 of the Regulation of 1787 had required every person instituting a suit in a court to pay

court fees at the rate of 2 to 5 per cent according to the following sliding scale :

On sums not exceeding	1000	rupees	....5%
,, ,, ,,	5000	,,	....4%
,, ,, ,,	10,000	,,	....3%
And all sums exceeding	10,000	,,	....2%

This provision was enacted with a view to check the supposed litigiousness of the people. But the number of causes pending in the several courts was a proof that it had been ineffective to produce the intended result. On the other hand, the monetary levy had often been the cause of much inconvenience and hardship to the suitors, who often regarded it as oppressive and obnoxious. A person having a claim to prefer but unable to raise the requisite amount of the deposit, had no alternative but to forgo his claim ; and in this way there was a denial of justice.

In addition to the deposit taken by the Government, the party was compelled to pay some other authorized charges of the court, the fees of the vakeel and other unavoidable expenses attending a suit. Litigation thus was a very costly proposition.

The imposition of the court fees had been justified by many on the ground that it discouraged litigation. These persons regarded the people of Bengal, Bihar and Orissa as being litigious by nature for thousands of cases remained pending in the Courts. It was apprehended that in the absence of court fees the number of suits coming before the Courts would rise enormously. Cornwallis, however, did not agree with this view. To him 'the tax' which 'the people were obliged to pay for having justice administered to them debarred many persons from recovering their rights.' People were not litigious in his view. He ascribed the large number of pending cases to 'dilatoriness and inefficiency of the administration of justice'. In his opinion 'these evils can only be remedied by speedy and impartial decisions, and punishing the litigants according to the circumstances of the

case, and not by imposing a fine upon all suitors indiscriminately, and then allowing their causes to remain for years undecided.'

Under the scheme of 1793, suits were expected to be decided expeditiously because the Judges were to devote their whole time to the task of administering justice without being distracted by any other public engagement. Cornwallis thus thought it to be expedient *to discontinue the exaction of court fees on the institution of suits.*

Under the new dispensation, therefore, no plaintiff was required to deposit any fees on filing his suit in the Court for decision.

The gates of Courts of Justice were thus opened to all, rich or poor alike.

CRIMINAL JUDICATURE

The criminal judicature of the country had been completely re-organised by Lord Cornwallis in the year 1790. In 1793, therefore, when the new scheme for the administration of civil justice was put into force, not many changes were introduced in the criminal field. Certain provisions, however, were made to integrate the scheme of criminal judicature with the new scheme of civil judicature. The reforms of 1793 had necessitated certain readjustments in the former scheme of 1790, and they were duly carried into effect by Regulation IX of 1793. The Regulation practically re-enacted with minor modifications and amendments all the provisions of the Regulation of December 3, 1790.

1. Under the scheme of 1790, Collectors were to act as Magistrates. Under the new dispensation of 1793, Collectors were envisaged merely as executive officers, devoid of all judicial powers. They had been deprived of their judicial powers in civil and revenue cases. Consistent with this policy they were deprived of the magisterial functions also. The Judges of the Courts of Diwani Adalat were henceforth to hold the office of the Magistrate. The procedure to be used by

them in the discharge of the office of Magistrate was to be the same as was laid down in 1790.

2. Four Courts of Circuit, consisting of two English Judges each, were established in 1790 for the trial of criminal offences in the provinces of Bengal, Bihar and Orissa. In 1793, Cornwallis established four Provincial Courts of Appeal to hear appeals from the decisions of the Courts of Diwani Adalat. To integrate the two systems of civil and criminal justice, the twofold functions, those of Circuit and Appeals, were combined to be performed by the same set of Courts. The Judges of the Provincial Courts of Appeal were to hear appeals from the Diwani Adalats. The same Judges were to go on circuit to try the criminals in the districts. In 1793, there thus came into existence four *Courts of Appeal and Circuit* in the provinces of Bengal, Bihar and Orissa.

No other change of any substance was made in the procedure or the constitution of the Courts of Circuit.

The constitution, powers and working of the Sadar Nizamat Adalat were left untouched. And, in all other respects, the scheme of criminal judicature as laid down in 1790 was to continue in operation.

THE LEGAL PROFESSION

Another very useful, wholesome and interesting institution created by Cornwallis in 1793 was the regular profession of lawyers or vakeels. For the first time, steps were taken to organise the legal profession on sound lines by means of Regulation VII of 1793.

The practice hitherto followed in the country by the suitors was either to appear in person to plead their causes or appoint such agents for this purpose as they thought proper. The persons deputed for this purpose usually used to be the servants or dependents of the parties. Such persons knew nothing of the constitution, forms and practice of the courts. They had no adequate knowledge of either the Hindu Law, the Mohammedan Law or the Regulations of the Government.

They being unaccustomed to judicial proceedings, protracted the trials by producing unnecessary exhibits, stating irrelevant questions to the witnesses, and summoning unnecessary persons to give evidence, whose testimony was not essential to the development of the merits of the case. More often, such persons were exposed to the intrigues of the ministerial officers, who harassed them and extorted money from them, by an abuse of authority in the execution of the common process of the courts. The agents deputed to plead causes being mostly ignorant of law and procedure were incapable of urging the best arguments in support of the claims of their constituents, or of judging whether the decisions and proceedings of the courts were conformable to the laws and regulations or otherwise. The ignorance of the agents was chiefly responsible for the voluminous and irregular records of facts that were daily submitted to the Sadar Diwani Adalat.

Of course, there were certain persons who followed the profession of vakeels to obtain their livelihood and appeared in courts of justice on behalf of their clients. They, though better acquainted with law and procedure of the courts than the private agents of the parties, were equally unfit for the purpose. They were generally persons of low character. They had no reputation to lose by misconduct. They were often bribed by the opposite party to betray the cause of their constituents. If detected in bad conduct in one court, they could move to another. They assumed and relinquished the occupation, without informing the courts in which they practised. There were no rules to regulate the profession. The allowances of these vakeels were not fixed by Regulations. Their demands were generally exhorbitant. It was in their interest to protract, instead of expediting the decision of the suit, as their salary ceased with its termination.

Under such circumstances speedy and impartial administration of law and justice was impossible. Often there were intrigues and injustice. Cornwallis appreciated that 'weak indeed must be the administration of justice in a country where there are no such establishments. Whoever has had any experience

in the judicial proceedings of this country, must be sensible how much both the judges and most of the suitors stand in need of them (professional lawyers)'. *For an impartial and efficient administration of justice,it was necessary to have a well regulated legal profession.* To tone the administration of law and justice up, to enable the courts to dispense justice properly and efficiently, to make it possible for the people to obtain justice and to improve the quality of justice dispensed by the courts, *it was absolutely necessary to make the pleading of causes a distinct profession.* Daily, the Government made Regulations touching, in many important respects, the people, their property and their privileges. The great body of people, due to their pursuits and occupations in life, could not possibly attend to their own causes in the courts. They could not acquire a sufficient knowledge of the laws and Regulations and so could not plead their causes effectively. *A well regulated profession, consisting of men of character and education and versed in the laws and Regulations, was absolutely necessary in the interests of justice.* A pleader of this description was expected to urge the best arguments in favour of his clients. It was necessary in the interests of justice that arguments, for and against a claim were stated to the Judge, whose judgments could not then err, and if they did, there was every probability of the error being corrected in the higher courts. A licensed vakeel would not only inform the Judges by his pleadings, but also was a great check upon their conduct. No act of partiality or deviation from the laws could escape his notice or fail to be exposed. He would lay the Judges under the necessity of making themselves acquainted with the laws and Regulations, and of administering them impartially.

With this in view, Regulation VII of 1793 made many rules to govern and regulate the profession of lawyers. The various Courts were to appoint these pleaders under *sanads* to be issued by the Sadar Diwani Adalat. Every pleader was to take an oath for faithfully executing his duties. Care was to be taken that persons of good character, liberal education and versed in the knowledge of Hindu and Mohammedan Laws only were admitted to this profession.

Pleaders convicted of promoting and encouraging litigious suits, or of frauds, or of gross misbehaviour, were to be suspended. The Court taking such action was to report the matter to the Sadar Diwani Adalat, which could fine the pleader, dismiss him or allow him to resume his practice. The vakeels were not to be dismissed for misconduct unless proved to the satisfaction of the Sadar Diwani Adalat. This safeguard was essential to secure that the pleaders were not deterred from pleading causes of their clients with becoming freedom. A security of tenure was necessary to them. They could also be dismissed for incapacity, misconduct in the discharge of public duty, or gross profligacy or misbehaviour in private life, proved to the satisfaction of the Sadar Diwani Adalat.

The lawyers were to charge very moderate fees, a schedule of which was laid down by the Regulation. They were prohibited from demanding or accepting from their principals any fee or sum of money, or any goods or effects for pleading their causes besides the fees authorised, under pain of dismissal.

Vakeels wilfully delaying the suits of their principals for their own advantage were to be liable to a prosecution for damages ; and if convicted, they were to be dismissed from the Court and disqualified from acting as vakeels in future. Suitors were at liberty to prosecute the vakeels in the Courts for any fraudulent or bad practices.

To safeguard the interests of the clients, and to protect them from exploitation at the hands of the lawyers, the Regulation laid down that the pleaders were not to realise their fees directly from the clients. The Courts were to collect their fees, as a part of the decree passed by them, and pay them to the lawyers. The fees of the lawyers were added to the bill of the costs that the defeated party had to pay, the total amount being included in the eventual decree.

NATIVE LAW OFFICERS

As usual, all the Courts established under the Regulations of 1793, consisting of the English Judges, were to be assisted by the native Law Officers, Pandits, Kazis and Muftis, who were to

expound the principles of the personal laws applicable to the cases before the Courts. These Law Officers played a leading role in the actual administration of justice. It was, therefore, essential for the due administration of justice that the Law Offices in the Courts should be held by men of integrity, well versed in the laws, and that they should be so constituted, as to render persons possessing the requisite qualifications, solicitous to obtain them, and to afford every encouragement to such persons, when appointed, to continue to discharge their duty with uprightness. It was likewise necessary upon general principles that the Law Officers should be subject to penalties for misconduct, so that they might be deterred from abusing their important trusts. To achieve these objectives, Regulation XII of 1793 enacted certain provisions.

The Law Officers of the Sadar Diwani Adalat, the Sadar Nizamat Adalat, the Provincial Courts of Appeal, the Courts of Circuit and the Courts of Diwani Adalat, were to be appointed by the Governor General in Council. They were awarded a security of tenure of office, for henceforth they were not to be dismissed except for incapacity, misconduct in the performance of public duty, or for any act of flagrant profligacy in their private conduct, proved to the satisfaction of the Governor General in Council.

The Law Offices were to be conferred on persons well versed in the laws, and of unblemished moral characters. All these Law Officers, on appointment, were to take an oath. Rules were made to regulate the proceedings in connection with charges of corruption or extortion preferred against the Law Officers. In the first instance, the Court to which the guilty officer happened to be attached was to take cognisance of the charge. An appeal could go up to the Sadar Diwani Adalat. In all such cases, the final authority to take any action lay only with the Governor General in Council.

LEGISLATIVE METHODS AND THE FORM OF REGULATIONS

The Regulations passed by the Government were usually drawn without any particular form. They existed partly in

manuscript and partly printed on *detached papers.* Cosequently, reference to them was very difficult. The general public usually had no means of access to these Regulations. They had no means of procuring them in a state calculated for easy reference, or for preserving them. In the archives of the Government, many Regulations were usually lost when the records were removed from one place to another. It was, therefore, absolutely essential to improve the form of Regulations and to evolve out ways and means by which the Regulations might be cognisable to the people at large, to the lawyers and the Judges. Cornwallis, therefore, suggested some reforms in the legislative methods and forms, which were duiy incorporated in Regulation XLI of 1793.

In the first place, every Regulation, henceforth, was to contain *a preamble reciting the reasons* for its enactment. This was a very useful provision. As the Government had to narrate reasons for enacting a particular Regulation, it would necessarily be obliged to consider well the measure before it gave final sanction to it. It would enable the Judges to apply the Regulation according to its true sense and meaning. What was of great importance in the country in which the members of the Government changed continually, the preamble would keep the successors of those who framed the Regulations informed of the grounds on which they were passed, and prevent their hasty repeal because the circumstances which gave rise to them had been forgotten. The Supreme Council having this information before them, as well as the effects which the Regulation had produced during the time it had been in force, would be able to modify the old Regulations or frame new ones with a greater certainty of their operating to the desired end.

In the second place, the Regulations enacted by the Government each year were to be numbered, and that at the expiration of each year the Regulations passed during the course of it, were to be printed and bound up in volumes, and a sufficient number of these volumes were to be sent to the Courts of Justice and the various other functionaries. In this way, a regular and complete Code of all the Regulations, enacted by the

British Government, was to come into existence. Such a Code was to be very helpful in the general administration of justice in the country. It would facilitate reference to the different Regulations. Every person engaged in the work of the administration of justice would thus be able to know the relevant law without much difficulty.

To enable the general public to understand the provisions of the Regulations, it was ordered that every Regulation should be translated into the Persian and the Bengali languages. The translator was 'to translate the regulations into plain and easy language, and in all possible cases to reject words not in common use'.

The celebrated Regulation XLI of 1793 thus started the process of compilation of the Regulations into a Code. It inaugurated the era of what may conveniently be called as the system of 'Regulation Law'. The Regulations henceforth were to be framed on the same lines as the Acts of the Parliament in Great Britain. This step indicated a great effort towards making the laws certain, definite, easily traceable and accessible to all.

CORNWALLIS V. HASTINGS

Cornwallis' measures in a way indicated the culmination of the process that had been initiated by Hastings. Hastings had decided in 1772 to assume full responsibility for the Government of Bengal, to implant the sovereignty of the Company in the constitution of the Province, and thereby to abolish the mistaken system of dual government which had been introduced by Clive in 1765. Cornwallis' judicial reforms completed this constitutional change. In 1772, Hastings had assumed the entire responsibility for administering civil justice. But he had not, however, introduced many reforms in the sphere of criminal justice. To a great extent, he left the indigenous machinery of criminal judicature intact. The function of arresting criminals, however, had been entrusted to the English Magistrates in the districts. In 1781 he had also established a sort of supervisory control over the criminal judicature through the office of the

Remembrancer of the Criminal Courts. Cornwallis' measures in this direction constituted only the next step. Cornwallis had done in the criminal field what Hastings had done in the civil sphere much before.

The separation of revenue administration from civil jurisdiction—the most important feature of the scheme of 1793—had been foreseen, and even partially implemented, by Hastings through his plan of 1780.[1] The Judges whom Hastings appointed in 1780 to preside over the Civil Courts were wholly unconnected with revenue affairs. The bifurcation of functions was only partial, as the Collectors and not the Diwani Adalats, were authorised to decide cases relating to revenue. In 1793, Cornwallis was successful in implanting the principle of complete divorce between the Executive and the Judiciary. Henceforth, the Courts and not the Collectors, were to take cognisance of revenue cases—an important step, more progressive than what Hastings had effected. And Cornwallis' measure of subjecting the Executive to the judicial control, was something which Hastings had never contemplated. It was Cornwallis who for the first time enunciated the principle of the 'Sovereignty of Law', and gave it a practical shape. He made it a living principle, and on this foundation he erected the super-structure of the mosaic of the Indian Administrative System.

APPRAISAL OF THE SYSTEM OF 1793

The judicial arrangements of 1793 were expected to cost an additional sum of four lacs of rupees. Cornwallis did not wait for the sanction of the Company to his proposed reforms. He carried them out on his own initiative and responsibility. He was thoroughly convinced of the necessity, urgency and the expediency of reforming the then existing judicial system in the provinces of Bengal, Bihar and Orissa. Cornwallis was about to return home. He was anxious to put his proposals in the final shape and working order. He did not want to leave India without effecting reforms in the judicial sphere. Had he referred

1. See page 131,

the proposed arrangements to the Directors much time would have elapsed before he could have known their decision, and he could not possibly wait for all that period. Due to the peculiar circumstances of the situation, Cornwallis found himself in a predicament, and he ultimately decided to act on his own initiative. 'Having during the corsiderable period', observed Cornwallis, 'that I have presided over their affairs had ample opportunities of observing how inefficient the various arrangements of former governments have proved to establish a system for governing this country conformable either to the liberal and humane spirit or the real interests of the British Nation, I have considered it to be one of the most valuable services which I could render to the Company to devise remedies for such pernicious defects, and to propose that no further time should be lost in applying them.' He persuaded himself with the thought that the Court of Directors must be sensible that 'no motive could have induced me to undertake a laborious and complicated arrangement at the close of my administration, but a conviction of its being essential for the national honour and the future prosperity of their dominions'.

The question of increased expenses that the proposed reforms entailed was a ticklish one. Cornwallis realised that the Company was in no temper to incur additional expenses and that, on the other hand, it wanted to reduce the cost of administration in India. But Cornwallis did not agree with this view. He was in favour of giving Bengal an honest, efficient and impartial judicial machinery. He knew very well that the future prosperity of the country depended to a very great extent on the kind of justice that was meted out to the people by the Courts. A regard for the honour and interest of Britain forbade him to resist considerations *'that are founded upon evident principles of true humanity and sound policy.'* It was, in his opinion, unjustifiable in every point towards a people who paid so great a revenue, and from whose industry England derived so many advantages to deny them the benefit of such part of the public revenue as might be necessary to defray the charges of good government. He believed that the proposed arrangements were essential for good government. Cornwallis pointed

out: 'To have suffered therefore the increase of expense estimating it at the greatest possible amount to operate as a bar to the adoption of them, would have been a destruction and even a criminal species of economy.' Cornwallis did not feel any repugnance at proposing the augmentation of the public expenses because retrenchments had been made in every department of the government in which they could be effected.[1]

It goes without saying that in the face of such a powerful advocacy and earnest pleading, the Company could not have vetoed down the reforms. The arrangements of 1793 continued to be in operation even after Cornwallis left India, with such modifications, as the exigencies of the situation and the wisdom of the successive governments suggested. The Company paid a fitting tribute to Cornwallis for his magnificent achievement, and his system formed the basis of the judicial systems created in other Provinces like Madras, Bombay and Banaras.

Cornwallis was thoroughly convinced that no system could ever be effective, so long as the personal qualifications of the individuals that might be appointed to work it, formed the only security for its due execution. Security of person and property must be established by a system upheld by its own inherent principles and not by the men who were occasionally to have the conduct of it. It was imperative that the general body of people must feel and be satisfied of this security before they could exert themselves in industrial, commercial and agricultural

1. In a letter to the Court of Directors, Cornwallis implored them to think favourably of the reforms irrespective of the question of costs He wrote : 'These arrangements so important to the prosperity of your affairs will be productive of an immediate additional expense of four lacs of rupees per annum.....We have not a doubt but you will think this additional expense well bestowed when you consider the happiness the arrangements will dispense to the many millions of people who are your subjects, the prosperity it will diffuse throughout your possessions, and the stability it will give to your government by connecting the interests of the people with its continuance ; we think, exclusive of these considerations, it would have been a culpable and even a criminal species of economy and inconsistent with the humane and liberal spirit with which the British nation has been actuated with respect to this country, to have withheld from a people from whom we derive so great a revenue such a portion of the public income as is indispensably necessary for the good government of the country for which we conceive these arrangements to be essential'.

enterprises. It was this motive force which prompted Cornwallis to introduce the remarkable reforms of 1793. He had taken care to devise a system, which from all standards and tests, was exquisite as a system designed to afford adequate protection to the person and property of individuals. Every care had been taken to see that persons responsible for operating the scheme did not have within their power to misuse their authority or to deny the protection of the system to any individual. The system was based on *checks and balances*. The old system of 1787 in which the Collector was a sort of semi-autocrat was scrapped. In the new system of 1793, no functionary had any authority to exercise without being supervised by some higher tribunal. The executive officers were amenable to the Courts for all acts done by them in their official capacity. They were personally liable for anything done by them beyond the *legitimate sphere* allotted to them by the Regulations. The Courts of Diwani Adalat had been put under the supervision of the Provincial Courts of Appeal, the latter being put under the supervision of the Sadar Diwani Adalat. Munsiffs and Registrars were under the superintendence of the Courts of Diwani Adalat. All decisions of the Courts of Diwani Adalat were appealable to the Provincial Courts of Appeal, from where appeals in cases above one thousand rupees went to the Sadar Diwani Adalat. Similarly, Magistrates acted subject to the control of the Courts of Circuit, which in their turn were subject to the supervision of the Sadar Nizamat Adalat. All these *safeguards* were adopted to obviate any possibility of misuse of power by any functionary.

The reforms of 1793 were the result of very meticulous and elaborate planning and earnest endeavour. In 1793, Cornwallis did not confine himself only with reclaiming and improving the judicial system. He directed his attention to all spheres of governmental activity, viz. Revenue, Executive, Commercial and Customs. His various measures were contained in a set of 48 Regulations, all of whom were passed on one day, i.e. First May, 1793. *All of them were collected and*

compiled together into a single Code, which in later years came to be known as the Cornwallis Code.

One is surprised at the thoroughness with which the various problems and multifarious details connected with the new judicial system were tackled by Cornwallis. All grades of judiciary, from the highest to the lowest, were very well pieced together. The various details regarding the constitution, powers and jurisdiction of the Sadar Adalats, and of various other Courts down to the Munsiffs, had been worked out thoroughly well and set in a frame and scheme. The procedure to be followed by the judicial tribunals in discharging their duties was very carefully laid down. Even minute details had been duly cared for.

Cornwallis gave a new face to things in India. He designed the judicial machinery with a view to ensure *fairness, impartiality and efficiency in the administration of justice.* But this tendency had a drawback in so far as it tended to make the machinery technical and cumbersome. He pinned his faith in the *System* rather than in the personnel charged to work it. He did not wish to leave any loophole anywhere in the machinery, with the result that the system became over elaborate, incapable of moving smoothly and with despatch. A variety of forms were laid down without paying strict attention to which no business could be transacted by the Courts. The procedure to be applied by them was quite technical. An unduly large number of appeals from tribunal to tribunal was allowed. From the decisions of the Munsiffs, appeals could be made to the Diwani Adalat. From the Diwani Adalat, a further appeal in these cases went to the Provincial Court of Appeal. From the Registrar's Court, proceedings went to the Diwani Adalat for the Judge's countersignatures, and then an appeal could go to the Provincial Court of appeal. Every decision of the Diwani Adalat, irrespective of its pecuniary importance or legal significance, was appealable to the Provincial Court of Appeal, a further appeal lying to the Sadar Adalat in cases over Rs. 1000. These safeguards, though devised with the best of spirits and intentions—the idea

being to exclude any opportunity or probability of partisanship on the part of a Judge so that people might get unadulterated justice and nothing else but justice without fear or favour—yet tended to make the judicial machinery very tardy and slow in its motion. An anxiety to make the system perfect resulted in making it complicated and encumbered. The judicial system of Cornwallis, though based on very sound principles, proved to be inadequate to meet the demands for justice. Year after year a large number of cases remained undecided; business of every Court fell rapidly into arrears. The post Cornwallis period witnessed the Government desperately endeavouring to devise ways and means to reduce the '*melancholy list of arrears*' in the Courts. However, Cornwallis' work was a great work and *to admit the existence of some practical defects, is only to admit its humanity.*

INDIANS EXCLUDED

The *gravest* defect in the Cornwallis' Judicial System was the exclusion of Indians from all effective share in the administration of justice. Cornwallis started, with a wrong premise that Indians were unworthy of trust and that they could be associated with the government only in the humblest of posts and situations. The most controversial of his innovations was the substitution of English for Indian Judges in the Criminal Courts. It is true that there was unprecedented corruption prevailing in the criminal judicature at the time he introduced his reforms in 1790 and that it was as a result of this circumstance that he came to the conclusion that Indians were unworthy of trust, that they must no longer be allowed to hold high offices and responsible posts, and that they must be replaced by Europeans in whose capacity and integrity he appeared to have faith and confidence. The Indian might be permitted to hold minor posts, since there were not enough Company's English servants to fill them. Cornwallis, therefore, excluded the Indian from the field of criminal justice in 1790. Similar distrust led him to exclude the Indian in 1793 from any substantive share in the discharge of civil justice. He was entrusted only with minor judicial powers. He as Munsiff

could take into cognisance only petty suits in which the subject matter did not exceed fifty rupees.

Cornwallis perhaps forgot that the Company's European servants were notoriously lax until he had thought it necessary to purchase their honesty by increasing their lawful emoluments. He failed to realise that corruption in the ranks of Indians was due to their inadequate emoluments and salaries. He failed to appreciate that the policy which had paid rich dividends in the case of Europeans—the policy of increasing their emoluments—would also produce the same beneficial results if applied to the Indians.

The exclusion of the people from all offices of trust proved to be prejudicial to the public business. Multiplication of European administrators was no remedy. Quite apart from the prohibitive expense, such a policy was not calculated to increase efficiency and efficacy of the administrative system. The Europeans were ignorant of the traditions, customs, manners and language of the people. They were placed in too high a social position to have any general intercourse with the inhabitants of the country. In the judicial sphere, particularly that of criminal law and justice, the English Judges were often at a loss to understand the problems involved. With the passage of time it came to be realized more and more that Indians were better qualified to hear and decide both civil and criminal cases. Due partly to this realization and partly to the expediency and exigency of having a larger number of courts, which could not possibly be staffed by the Englishmen due to the considerations of heavy costs, Indians came to be associated more and more with the administration of justice in the post Cornwallis era. This development was only the consummation of that policy of the Company which it laid down as early as 1786, and which Cornwallis had ignored. The Directors had then declared that it would in many cases not be practicable, and, in general, by no means eligible in point of policy to appoint Englishmen exclusively. 'When the talents of the more respectable natives can with propriety and safety

be employed in the management of the country, we think it both just and politic to carry that principle into effect.' And they observed further : 'We do not hesitate to declare, as a leading feature of our future system, that the multiplication of British subjects in the interior districts or in the subordinate detail of Indian offices, is not necessary to good government nor productive of any benefit to the Company adequate to the vast expense attending it. We conceive also that *the natives in general are most competent to the duties of detail in that climate*, and in fact have always conducted the laborious parts of them'.[1]

1. *Italics mine.*

CHAPTER XI

RISE AND PROGRESS OF ADALAT SYSTEM SIR JOHN SHORE

FIRST CHANGE IN 1794

Cornwallis left India immediately after establishing his new system in 1793. He did not stay to see the scheme in actual operation. Shore succeeded Cornwallis as the Governor General, and on him, therefore, devolved the responsibility of working these reforms. Shore started his career with a profound respect for Cornwallis' system, his initial reaction being, 'the judicial system proceeds well. I am satisfied that his Lordship's plan was solid, wise, and has proved beneficial to the country.'

In the meantime, the Court of Directors had also approved of the Scheme. In their letter of 29th December, 1794, the Governor General and Council referring to this are found to observe :'. . We have been highly gratified by your very strong and flattering approbation of the arrangements which were adopted on the 11th February 1793,[1] for the government of Bengal Provinces.'

No system, howsoever deliberately and elaborately planned it may be, can be expected to be perfect and free of defects. Within a very short time, the judicial system of Cornwallis appeared to be afflicted with a serious malady. A large volume of judicial work awaiting disposal at the hands of the Civil Courts was the one peculiar phenomenon which the post Cornwallis period witnessed in Bengal. The accumulation of causes on the Judges' files was such as to threaten to put a stop to the course of justice. An idea of the magnitude of the problem which presented itself to the Government for solution may be had from the following letter of the Collector of Burdwan, dated 17th March 1795. The Collector observed : 'I have reason to believe that the whole number of suits now

1. The day when Cornwallis penned his Minute and unfolded the proposals which the Council adopted.

undecided in the adalat of this district, will be found to be *not less in number than thirty thousand*, and that half this accumulation of business in arrear, has taken place, in the course of about nine months.' The Collector pointed out that the work before the Court was impossible for human powers to be performed. The Court, on a very liberal estimate, could be expected to get through ten suits per diem, for the Judge had to devote some of his time to his office of Magistrate, and that every suit in the Diwani Adalat, whether for a large or a small sum, required the same formality of procedure. On an average of ten suits per day, and allowing for the Court to sit for the dispatch of business every day in the year, not even Sundays excepted, the period required by the Court to clear off the pending load of business would be about eight or nine years. On a computation it was estimated that at the end of that term, the load of pending business, instead of perfectly gotten rid of, would be found increased, to the number of one hundred and sixty five thousand suits, if the rate of filing the suits before the Court for all that period continued to be the same as it hitherto had been. The Collector thus observed in utter despair: 'It follows, therefore, that a man who at this time files a bill in the Diwani Adalat, and provided his cause be brought to decision in regular rotation, cannot look for redress of his injury to be afforded him, in less than eight years; and that a man who, at the end of that period, should file a bill, could have no very good prospect of its being brought to decision, in the whole term of his life; and, moreover, that the number of plaints pending at the end of every year, would be found still accumulating in a ratio which would ultimately prolong the prospect of decision, beyond any assignable limit, and thereby destroy the purposes of an adalat altogether.'[1]

The vast accumulation of business was not a peculiar feature of the Burdwan Court only, but was common with every other Court in the country. The whole normal judicial process and the course of justice was in a way threatened with complete

1. Fifth Report, 1812, Bengal App. No. 6.

stoppage. The situation led to a denial of justice in a vast majority of cases for there is the well known saying, *'Justice delayed is Justice denied.'* The state of the inhabitants in regard to judicial matters was thus very deplorable. The avowed purpose of Cornwallis—to give to the natives a free and impartial distribution of justice—was thus in the danger of being completely frustrated due to the vast accumulation of business in arrear.

Under the Scheme of 1793, the function of deciding and settling revenue disputes, including demands of revenue, had been entrusted to the Diwani Adalats.[1] This was one of the factors responsible for the accumulation of undecided causes in the Diwani Adalats. But, on the other hand, the accumulation of work in the Courts was responsible for the delay in the disposal of revenue causes. This development gave rise to an evil of great magnitude. So far as the Government was concerned, it had the power to liquidate and realise its revenue dues from the zemindars by means of a brief and efficient method—that of selling away the defaulters' lands. The zemindars, however, had no such remedy available to them to realise their dues from their tenants. They could only go to the Courts and realise the dues through the ordinary judicial process. This system turned out to be very inequitable in practice. In the Courts of civil judicature, the accumulation of causes undecided had proceeded to such an extent, as almost to put a stop to the course of justice or, at least, to leave to a zemindar little prospect of the decision of a suit, instituted to recover payment of his rent, before his own land was liable to be brought to sale in liquidation of an outstanding balance, under the more expeditious mode of procedure established against him by the Government. In the circumstances, it was impossible for the Courts to afford any adequate means to zemindars to speedily enforce payment of their just demands. The zemindars were unable to make good their engagements with the Government due to the delay arising out of the judicial process. In consequence, many

1. See page 168.

sales of zemindary lands took place, causing distress and misery in the ranks of the zemindars.

Many representations were made to the Government urging it to take some steps to resolve the difficulties. Accumulation of undecided business in the Courts was such as to clog completely the wheels of justice, which affected the Government as well as the private individuals. That the delay in the disposal of suits caused great hardship is very clear from a letter of the zemindar of Bishenpore addressed to the Government.[1]

Such a state of affairs was bound to affect the collection of revenue. It was, therefore, indispensable for the Government to take some immediate steps to set matters right.

In his anxiety to secure an impartial and pure distribution of justice in the country, Cornwallis had laid down an elaborate and somewhat intricate procedure for the Diwani Adalats. One way out of the difficulty suggested to the Government was *to simplify the procedure generally*, and to render it *more summary and expeditious in revenue cases*, particularly. The Government discountenanced this suggestion for in its view, 'the forms are equally essential to the due administration of justice, and to the expeditious determination of suits; and where the forms now prescribed, differ from those heretofore in use, the variation has been made, with a view to render them better adapted to the purposes for which they are established.'

Another suggestion made to mitigate the accumulation of

1. He wrote: 'The causes which were instituted in the adalat for the enforcement of demands of rent last year, and before that time, lie undecided, and the renters of the present year are prepared to avail themselves again of the same delay, by withholding payment of the rents, and thereby compelling me to have recourse to the adalat; for these people, observing that the demands long standing, which were long since submitted to the adalat, are not yet enforced, they say to themselves, 'Recourse was had to the adalat in the past years, to make us pay our rents, but nothing has been effected against us. Why, therefore, should we fear to withhold the dues of the present year?' We cannot be forced to pay without orders from the adalat, and have nothing to fear for the present...' (Fifth Report 1812, Bengal App. No. 6)

business then in arrear, and thus to alleviate the consequent deplorable state of the inhabitants of the country, in regard to judicial matters, was to add many more Courts of Adalat to those already in existence. Undoubtedly, the case for increasing the number of Courts was unimpeachable. The Judicial System of 1793 was inspired by the best of motives—motives to give a pure and effective administration of justice at a very low cost. But a close analysis of the scheme will reveal that the means provided were inadequate to achieve the end in view. For the three provinces of Bengal, Bihar and Orissa, there were established only 26 Civil Courts, 23 in the districts and one each in the three cities of Patna, Murshidabad and Dacca. Besides these principal Courts, each district had a Court of the Registrar and several Courts of the Munsiffs. But the jurisdiction of the Courts of the Registrar and the Munsiffs was very minor. The bulk of business, therefore, necessarily came before the Court of Diwani Adalat.

To make justice easily accessible, Cornwallis had abolished court fees.[1] Further in every case, an appeal might be obtained from the original decision, however small the amount involved in the suit, to two distinct Courts of Appeal. Moreover, the newly established Courts had also the responsibility of adjudicating upon the causes arising out of revenue. All these factors had appreciably increased the work of the Courts. Adequate means had been adopted to facilitate litigation, but the means provided for the disposal of suits and disputes were not adequate. The large number of suits pending before the Courts proved beyond doubt that the number of Courts in the country was insufficient and inadequate.

The Government of Sir John Shore, however, had a fervent faith in the adequacy and sufficiency of the established Courts. It was not in a mood to increase their number. Its arguments were somewhat like these: before 1793, there was only one Court of judicature in each zilla; the Judge was likewise the Collector of revenue, and the greater part of his time

1. See page 182.

was necessarily appropriated to the business of realizing the collections, which admitted of no protraction, to making the settlements and to the voluminous correspondence and references incident to that branch of his duty. Under the Regulations of 1793, firstly, the Judges had no concern with the collection of revenue, the administration of laws being their sole duty. Secondly, there were the Courts of the Registrars. Lastly, there were the local tribunals in different parts of each zilla, for the trial of suits not exceeding fifty rupees which were expected to discharge an appreciable amount of judicial business and consequently enable the Diwani Judges to devote their attention to causes of magnitude coming before them.

In the opinion of the Government the accumulation of work was purely a temporary phase. The Governor General in Council declared without any 'hesitation' that 'whatever delay may have arisen in the decision of causes in the present or past year, it is not ascribable to the want of the necessary provisions for expediting the determination of them, but to the ample provisions already made for that purpose, not having yet had time to operate; and as the expeditious determination of suits tends to prevent litigation, in the same proportion as it is encouraged by delay in the administration of the laws, he entertains no doubt but when the different tribunals are established in *the full exercise of their powers*, that the suits now depending will soon be brought to a determination, and that in future, causes will be decided, with all the expedition necessary to give full effect to the principles of the Regulations.'[1]

The arguments of the Government were evidently fallacious. The new Judges, it is true, had no responsibility to collect revenue under the new dispensation, but their work had increased manifold owing to the fact that they had to decide revenue causes also. Further, it was misleading to compare the system of 1793 with the one that preceded it. Before 1793, the Collector in the district combined in himself

1. Fifth Rep. 1812, Bengal App. 6.

the functions of a Collector, Judge and Magistrate. It is not to be supposed that all suits and disputes arising in the district came before him for decision or that he performed his judicial work regularly and conscientiously. Suits of importance, or such as involved property to a considerable extent, or such as materially affected the resources of the Government, or rents of individuals in the revenue department, probably were investigated and decided by the Collector himself in the manner prescribed by the Regulations then existing. But by far the greater part of those petty claims, which must continually have arisen between individuals possessed of little property, and spread throughout the district, it is reasonable to suppose, were either settled by the Collector or his officers, *in a very summary manner*, or were adjusted among the people themselves in their own customary methods. The scheme of 1793 was intended to facilitate access to the Courts and make justice easily available to all. Many suits that did not come up for decision to the Collectors before 1793 came now to the newly established Courts. No conclusions about the adequacy or otherwise of the judicial system of 1793 could therefore be drawn by comparing it with the pre-existing system.

The state of judicial work was desperate and only some solid and concrete steps could have succeeded in providing any relief to the Courts. The Government, however, was not willing to adopt any such radical measure. Instead, it satisfied itself with effecting in 1794 *some minor readjustments in the Cornwallis' Scheme*. Regulation VIII of 1794 embodied the first steps taken by the Government to diminish congestion of work in the Diwani Adalats.

The Regulation, in the first place, effected a modification in the mutual relations of the Diwani Adalat and the Court of the Registrar in the district. To prevent time of the Judges of the Diwani Courts from being occupied with the trial of petty suits, and, consequently, to enable them to determine causes of magnitude with greater expedition, they were empowered under the judicial scheme of 1793, to authorize

the Registers to try and decide any suits for money or personal property where the value did not exceed two hundred rupees. The efficacy of this provision, however, had been whittled down appreciably by the direction that the decrees passed by the Registrar *were to be countersigned by the Judge* to denote his approbation of them, and were not to be considered valid unless they were so countersigned.[1] This restriction was equally applicable whether the parties were dissatisfied with the decision or not. The restriction in a way rendered the Judge solely responsible for the decision, and, therefore, the Judge was necessarily obliged to revise the proceedings of the Register in every case, which often occupied as much of his time as would have been required for the actual trial of the suits in the first instance, and thus tended to defeat the object of reference. The Registrar, in these circumstances, did not provide any effective relief to the Judge. The procedure multiplied labour for nothing. With a view, therefore, to the full attainment of the object of the rule, and to *prevent the time of the Courts of Diwani Adalat from being occupied by petty suits*, and further to expedite the administration of justice by relieving the Diwani Judge from the trouble of going through the whole process over again in the case of petty suits, the Government made the following rules in 1794:

1. The Judge of the Diwani Adalat was empowered and directed to refer to the Register for trial and decision, the causes for money or personal property where amount of the subject matter in contest did not exceed 200 sicca rupees.

2. For this purpose the Registrar was to sit three times in a week to try the causes referred to him.

3. The decrees of the Register were to be *final* up to a value of *twenty five rupees*. A discretionary power was, however, vested in the Judge of the Diwani Adalat to revise the decisions passed by the Registrar in such cases i.e., cases up to 25 rupees, in those instances where the decree appeared to

1. See page 182.

him *obviously unjust or erroneous.* The decree of the Judge, however, was to be final in all such cases.

4. In all other cases involving over twenty five rupees, the decisions of the Registrar were appealable direct to the Provincial Court of Appeal instead of the Diwani Adalat as hitherto.

By this provision, in fact, an *additional* Court for the trial of petty causes was established in each district, and each of the three cities of Dacca, Murshidabad and Patna. The Judges of the Diwani Adalats were exonerated from the tiresome job of deciding petty causes. Henceforth, they could devote their whole time and energy to deciding suits of greater magnitude with necessary expedition.

The revenue causes often involved long and intricate accounts, the adjustment of which was frequently necessary for their decision. The examination of such accounts consumed a large part of the time of the Diwani Judge. As a further relief to the Courts, *to expedite* the administration of justice and to save as much time of the Judge as possible, the above mentioned Regulation VIII of 1794, in the second place, empowered the Diwani Judge to refer to the Collector those cases of rent or revenue which involved any accounts and where the adjustment of accounts was necessary for the final determination of the suit. The Collector after going through the requisite accounts was to make a report to the Diwani Judge, which report the Judge *could either confirm, set aside or alter.* The Court could pass such decision or orders as might appear to it necessary or proper respecting the accounts.

The system of 1793, had, to all appearance, *severed finally* the work of administering justice from that of collecting revenue. The provision of 1794 under which accounts in revenue cases could be transferred to the Collectors for scrutiny, in a way, indicated the commencement of a re-transfer to the Collectors of judicial functions to some extent. The Collectors who had been deprived of all judicial powers in 1793,

got back a part of it in 1794. However, it was only the beginning of the reverse movement. The provision of 1794 did not as yet indicate any radical departure from the policy of 1793. The reference to the Collector was purely optional and in the discretion of the Judge. The Judge exercised full control over the report, as he could accept it or reject it. So far as this particular new provision was concerned it was not objectionable. On the other hand, it was convenient. The Collector could look through the accounts more quickly, effectively and expeditiously than the Court. Such a reference necessarily saved much time of the Judge.

Beyond this the Government was not prepared to go in 1794. Congestion of work in the Courts, the Government thought, was a temporary phase which was expected to subside with the judicial system setting in full operation and working order.

But the hopes of the Government were belied. Accumulation of arrears in the Courts continued as ever. A long train of cases continued to be pending before the Courts with no immediate prospect of determination. The Courts were overburdened with work ; the parties had to wait for long to have justice. The judicial system was suffering from the malady of pending, undisposed judicial business. The Government could not remain passive for long. It had to devise ways and means to expedite the decision of suits and to reduce congestion in the Courts.

CHANGES OF 1795

Some further readjustments in the mutual relationship of the various Courts of civil jurisdiction in the country were effected in 1795.

As noted above, Regulation VIII of 1794 had provided for an appeal from the Court of the Registrar direct to the Provincial Court of Appeal. This arrangement interfered considerably with the more important work of the Provincial Court of Appeal. The cases decided by the Registrars were all below two hundred rupees in value, and so the Provincial Courts of

Appeal had thus to spend their time over petty suits. Moreover, the parties concerned were put to much strain and inconvenience as they had to travel long distances to reach the seat of the Provincial Court of Appeal. Regulation XXXVI of 1795 improved matters by providing that appeals from the decisions of the Registrars would go to the Courts of Diwani Adalat instead of the Provincial Courts of Appeal. The time of the Provincial Courts of Appeal saved in this way could be utilised more profitably in disposing of work of greater importance.

Further, in such cases only one appeal to the Diwani Adalat was thought to be sufficient for the purposes of justice. The advantages which might be expected to result from allowing a further appeal from the decisions of the Diwani Adalat was more than counterbalanced by the delay in the determination of causes of greater importance that must necessarily arise from the considerable portion of time of the Provincial Courts of Appeal being occupied in disposing of appeals in petty cases. To avoid all these drawbacks, the above-mentioned Regulation of 1795 laid down that from the decisions of the Registrars, only one appeal would lie to the Court of Diwani Adalat and that the decisions of the Diwani Adalat in such cases would be final, no further appeal being allowed to the Provincial Court of Appeal.

Hitherto, appeals from the decisions of the Native Commissioners, known as Munsiffs, who used to decide cases only up to a value of fifty rupees, went first to the Courts of Diwani Adalat. And as all decisions of the Diwani Adalat were appealable to the Provincial Court of Appeal, their decisions in appeals in petty cases from Munsiffs were not final, a further appeal being allowed to the Provincial Court of Appeal. This arrangement was very vexatious and inconvenient to the parties involved in such cases. The advantages which might be supposed to result from allowing *two appeals* from the decisions of the Munsiffs in *petty cases* were more than counterbalanced by the delay and expense involved in this process. There was no necessity of having two appeals

in such petty causes. Regulation XXXVI of 1795, therefore, made the decisions of the Diwani Adalats *final* in all cases decided by the Munsiffs. Only one appeal was allowed in such cases. Appeals to the Provincial Courts of Appeal were stopped.

The net result of these changes was as follows: A district had a District Diwani Court consisting of an English Judge; there was a Registrar's Court capable to decide cases up to Rs. 200. Appeals from the Registrar lay to the Diwani Adalat. No further appeal was allowed. In every district there were a few Courts of the Munsiffs. In the judicial hierarchy in the country, they constituted the lowest Courts. Munsiffs were Indian officers, and were authorised to decide civil cases up to fifty rupees. Appeals from their decisions lay to the District Diwani Adalat. No further appeal was allowed. The District Diwani Adalat usually decided cases over Rs. 200. Appeals from its decisions lay to the Provincial Court of Appeal of the Division.

The same arrangements prevailed in the three cities.

RE-IMPOSITION OF THE COURT FEES

The above mentioned reforms in the judicial system failed to meet the exigencies of the situation. They failed to effect any appreciable reduction in the congestion of work in the Diwani Courts of the country. The files of the Judges were overwhelmed with pending cases as usual. Accumulation of work in the Courts had reached unprecedented dimensions, and the whole judicial administration was in danger of collapsing.

Obviously, the best remedy to meet this sorry state of affairs would have been to increase the number of Courts in the country. Most of these Courts could have been staffed by Indians, who did not cost as much as the parallel English officers. The Government, however, shirked from taking this step. Considerations of cost, perhaps, deterred the Government from adopting this course. Instead of this direct and

efficacious step, the Government embarked upon the policy of discouraging litigation. The Government in its despair introduced a measure in 1795, whose desirability was dubious, whose wisdom was doubtful, and which, as a remedy, was worse than the disease which it was designed to cure.

Before 1793, a small percentage of fee was levied on the filing of suits and for seeking justice from the Courts of the land. Lord Cornwallis desired to facilitate recourse to justice by affording law proceedings at little or no cost. In order to afford the readiest access to the new Courts of justice, it was ordained by him in 1793 that the court fee on filing a suit should be abolished. No monetary imposition was to be levied on the distribution of justice by the State. The judicial process was made wholly free; a party did not have to incur hea y expenses for prosecuting his claim in the Courts, the only expenses being the fee of pleaders engaged by the parties, charges in summoning witnesses etc. Similarly a party aggrieved at a decision of a lower Court could prosecute an appeal in a higher Court without much expense. Cornwallis realised that one of the primary functions of the State was to ensure justice for its subjects, and that the State should distribute justice to its subjects free of cost. Cornwallis translated this great ideal in to practice in 1793.[1]

The Government of Shore was anxious to devise some formula by which the number of cases pending before the Courts, as also the number of cases being instituted daily in the Courts, could be reduced. In its endeavour to locate the causes of the phenomenon of unprecedented volume of litigation in the country, the Government came to the conclusion that one such cause was the absence of court fees. The high number of suits was thought to be due to the moderate expenses involved in instituting and prosecuting them in the Courts of law. Instead of increasing the number of judicial establishments in the country, the Government of Sir John Shore dubbed the natives of Bengal, Bihar and Orissa as

1. See page 182.

litigious who wanted to harass the Courts by filing frivolous and vexatious suits. The Government expressed itself on this point thus: 'No expense attending the institution of suits in the first instance; and the ultimate expense being moderate and limited, whatever length of time the suit may be depending; and no fees whatever being charged on the exhibits and papers filed in the courts, nor on petitions presented in the courts not immediately forming part of the proceedings in any suit under trial; many groundless and litigious suits and complaints have been instituted against individuals, and the trials of others have been protracted, by the filing of superfluous exhibits, or the summoning witnesses whose testimony was not necessary to the development of the merits of the case. The business in many courts of judicature has in consequence increased, so as to prevent the judges determining the causes and complaints filed with that expedition, which is essential for deterring individuals from instituting vexatious claims, or refusing to satisfy just demands, and for giving full effect to the principles of the regulations.'

The administration of justice was, therefore, taxed by the Government. The institution of *court fees* was revived. Regulation XXXVIII of 1795 laid down the scales according to which the litigants were to pay the fees. For suits filed before the Native Commissioners or Munsiffs, a fee of one anna in the rupee was to be paid by the plaintiffs. The fees so received were to be appropriated by the Munsiffs to their own use, as a compensation for their trouble, and an indemnification for the expenses which they might incur in the execution of their office.

For suits filed before the Diwani Adalats, fees were to be levied according to a sliding scale. Between 50 and 200 rupees, the fee was to be half an anna in the rupee; from 1000 to 50,000, at a gradually decreasing rate from 3% to 1/2%; on sums beyond 50,000, at the rate of 1/4%. Certain other levies were also imposed. For calling and summoning witnesses, for filing exhibits and for any other intermediate petition, parties had to pay fees. Fees on the same scale had to

be paid for filing appeals from the Diwani Adalat to the Provincial Court of appeal and the Sadar Diwani Adalat.

These fees were to be paid not only by those who might file their claims after the enactment of the Regulation, but also by those whose cases had already been filed earlier and were awaiting disposal at the hands of the Courts. The result was that many pending cases were got rid off by the Courts. Parties whose suits had been pending before the Courts were required to deposit the money before a prescribed date. Many persons, residing in the interior of the country, were uninformed of the new requisition and thus failed to deposit the necessary fees. Many others could not pay because they were not in a position to pay due to their poverty. Many did not pay because they were indifferent to their claims ; while many did not pay due to want of confidence in their causes. Consequently, a large proportion of the pending suits was dismissed. Not many suits remained on the files thereafter. It was hoped that thus relieved and disencumbered, the Judges would be better able to discharge their judicial functions.

The imposition of the various fees rendered the judicial proceedings costly and expensive. The imposition of the fees was expected to repress litigation in future. The policy was carried a step further when in the year 1797, by Regulation V, new and heavier impositions were levied with a view 'to discourage the preferring of litigious complaints, and the filing of superfluous exhibits and the summoning unnecessary witnesses on the trial of suits, and also to provide for the *deficiency* which will be occasioned in the *public revenue...as well as to add eventually to the public resources* without burdening individuals.' The new fees imposed in 1797 were far heavier than the ones levied in 1795.

To provide relief to the overworked, overburdened Courts, the expedient utilised by the Government was to discourage litigation by levying on it heavy monetary impositions. Justice was made dearer and less easily accessible. Taxation of litigation was meant to frighten away suitors from the doors of the Courts. The step was tantamount virtually

to a wholesale denial of justice to large sections of the populace. Many genuine litigants could not avail of the Courts owing to their inability to defray the expenses of a judicial process. The propriety of the measure was questionable. Many responsible officers of the Government criticised this step. The most typical criticism came from the Judge of Midnapore. He observed: 'Litigation may possibly have been checked by the fees and stamp duty but I confess I consider the charges too high. It will not, I imagine, be denied, that it is desirable the least tedious and the least expensive mode of obtaining redress, should be open, where an injury has really been suffered. When a poor man has been oppressed, he should be freed from trouble and expense, and assisted and encouraged as far as possible, in prosecuting his complaint. He is not, in such a situation, a fair object for taxation. It does not become the ruling power, to add to his misfortune, by levying impositions upon him. It is clear, that a ryot, from whom an increase of rent has been exacted, and instituting a suit for the same, must feel the charge of stamps and fees, to be a severe aggravation of his distress; nor can he console himself under the reflection, that the impositions are intended to check litigiousness: or that, for certain reasons of finance, it is expedient he should submit to new exactions. The expense and delay to which ryots are subject in prosecuting their suits, are to my knowledge, excessive.....'

He went on to say: 'It must, I am sure, constantly happen, that a ryot gives up his prosecution in despair, on finding the expense of continuing it, beyond his power to sustain. It is not the original fee on the institution of the suit, but the subsequent charges on exhibits and witnesses, that appear to me intolerable. *I have often seen a suitor, when stripped of his last rupee, and called upon for the fee on a document, produce in court a silver ring or other trinket, and beg that it might be received as a pledge; and after all, perhaps he was cast for want of money, to bring proof. I confess, I think such scenes in a court of justice, unpleasant to those who are entrusted*

with the administration of the laws; and not very creditable to government.'[1]

The same Judge was of the opinion that the complaints were seldom or never litigious; 'but suits simply litigious, brought forward merely from the quarrelsome disposition of the prosecutor, are not common; neither, if they were common, would it in my opinion, be proper to take any measure, except that of fining the individual suitor.'

He continued: 'The fact appears to me, this: When the business of the civil courts became too heavy for the Judge, which very soon happened, instead of appointing more judges it was resolved that, to prevent the accumulation of causes, it was necessary to check the spirit of litigiousness, which was supposed to produce it. Accordingly, heavy taxes have been laid upon prosecution. Out of 100 suits, perhaps five at the utmost, may be fairly pronounced litigious, and those five are probably instituted by men, well able to bear the expense.'

And he continued, 'If what I have understood is true, that suits in the Diwani Adalat are now prevented from accumulating as heretofore, it is not because the litigious only, are deterred from prosecuting; since a man is disabled from sustaining expense, in proportion as he is poor, and not, as he is litigious. Nothing else can be inferred from the fact, than that the charges of prosecution are so exactly calculated, and the fees and stamp duties so judiciously contrived, as to enable the courts to administer justice to all who can afford to pay for it.'[2]

The Moorshedabad Court of Appeal also commented adversely on this measure. It observed: 'The increased expense of law suits has never been found to check litigiousness. On the contrary, it has been generally observed, that litigious is encouraged thereby, in the hope that the certainty of expense, added to the uncertainty of the result, might deter parties from

1. Italics *mine*.
2. Fifth Report, 1812, Bengal Appendix, 10.

defending, even just rights. On comparing the half yearly reports of the several adalats in this Division it does not appear that the number of suits filed since the establishment of the fee paid to government on the institution of suits, of the fees paid on exhibits in the courts of judicature, and of the stamp duties, differs much from the number filed, in a similar period previous thereto'.

The institution of the court fees on the filing of suits was not welcome from any point of view. It was a very inequitable imposition which injured the poor persons most. Whereas many poor but genuine complainants were debarred from prosecuting their just claims in the courts, many unscrupulous but rich persons were prompted to misuse and abuse the judicial process and harass the poor persons. The high ideals and the humane approach which pervaded the scheme of Cornwallis, were being lost sight of. In form the judicial plan of Cornwallis was still in operation but the spirit behind it had been thrown overboard within a short time of his leaving India.

That justice should be cheap and the judgment seat easily accessible, are the two first essentials of a good judicial system, and Cornwallis endeavoured to secure both. But under the Government of Shore, taxation of litigation made justice dear and inaccessible to a vast section of the population. It was a very retrograde step. In this way, Cornwallis' achievements had been undone to a substantial extent.

Since the days of Shore down to the present day, this obnoxious imposition on the distribution of justice by the State has been subsisting. The second Law Commission in 1856 suggested abolition of this levy but nothing came about. The recommendation of the Commission was :

'In the Cornwallis System there was no institution fee in courts of the Company. The state defrayed the expense of all the judicial establishments. No institution fee had ever been paid in the Supreme Court.... An institution fee, in the case of civil suits was established by Regulation XXXVIII of 1795, not

as a source of revenue, but, as appears from the preamble of the Regulation, for the purpose of preventing vexatious litigation. By Regulation VI of 1797, the institution fees were converted into stamp duties; the preamble there assigns the same object, but adds also that of increasing the public revenue. The last purpose is the only one mentioned in Regulation I of 1814, which further regulates these payments....Having to provide a uniform system of procedure for India, we have thought it better on the whole to abolish the institution fee, rather than to recommend its extension to Calcutta.'

RESTRICTION OF APPEALS TO THE SADAR DIWANI ADALAT

Lord Cornwallis' general policy of dissociating the Judiciary from the Executive, underlying his judicial reforms of 1793, did not extend to its logical conclusions. It did not apply to the Sadar Diwani Adalat, the highest Court of the Company, where the Governor General and members of the Council functioned as Judges. Apart from the general objections to such a combination of functions in any State, the arrangement in the context of Bengal was all the more unsatisfactory, clumsy and inconvenient.

Under the scheme of 1793, all decisions of the Diwani Adalats were appealable, firstly to the Provincial Court of Appeal and secondly, in all cases where the subject matter exceeded one thousand rupees, to the Sadar Diwani Adalat. The number of appeals thus flowing to the Sadar Diwani Adalat was *very large*. It was found that the judicial work coming before the Court occupied enough time of the Judges. The Governor General and members of the Council had multifarious other duties to discharge. They, therefore, could not devote so much time to the Sadar Court as the quantity of judicial work before it demanded. Moreover, the Court was too much occupied with suits of small denomination. It could not devote much of its time and attention to suits of greater magnitude.

The Government thus felt it to be requisite to limit the number of appeals to the Sadar Court. The first step in this direction was taken by Shore in 1797. Regulation XII of that

year laid down that the decrees of the Provincial Courts of Appeal would be final in all cases of *money or personal property* not exceeding Rs. 5000. Appeals to the Sadar Diwani Adalat could be made in all cases of *real property* over Rs. 1000 and other cases of money or personal property over Rs. 5000.

SHORES' REFORMS—AN APPRAISAL

During his tenure of office, Shore was called upon to effect changes in Cornwallis' judicial system with a view to expedite the disposal of suits coming before the Diwani Adalats. These changes mainly followed two courses: one, *restricting the right of appeal* to the higher Courts from the decisions of the lower Courts; two, imposing a monetary levy on the institution of suits. The basic idea of restricting appeals was to expedite the final disposal of suits, and to some extent this was an improvement on the Cornwallis' system. The imposition of a monetary levy on the institution of suits was expected to discourage litigation. This, however, was a retrograde step, and Shore had thus knocked out one very vital principle of the Cornwallis' system—that of providing justice free of cost to all.

EXTENSION OF THE ADALAT SYSTEM TO BANARAS

In the year 1795 the Governor General in Council at Calcutta determined, with the concurrence of the Raja of Banaras, to introduce into the province of Banaras, as far as the local circumstances permitted, the same system and rules for the administration of justice as were, in 1793, established within the provinces of Bengal, Bihar and Orissa. In consequence, a series of fifteen Regulations were enacted by the Government of Bengal establishing the Adalat System in the province of Banaras, which, to a very great extent, was based on the Bengal model. The city of Banaras, with a certain extent of territory around it, was formed into a district; the rest of the province of Banaras was distributed into three other districts, to be known as the districts of Mirzapur, Gazipur and Jaunpur. In each of these four districts, a Court of Diwani Adalat for the trial of civil suits in the first instance was established, each with an English covenanted servant of the Company

as the Judge. The jurisdiction, powers and authorities of these Courts were to be similar to the Diwani Adalats in Bengal, Bihar and Orissa. (Reg. VII of 1795).

A Provincial Court of Appeal was established at Banaras for the purpose of hearing appeals from the decisions of the Diwani Adalats in the four districts of the Banaras province. The jurisdiction, powers and authorities of this Provincial Court of Appeal were to be the same as those of the other Provincial Courts of Appeal in Bengal, Bihar and Orissa. (Reg. IX of 1795)

The Sadar Diwani Adalat at Calcutta was empowered to receive and decide the appeals from the decisions of the Provincial Court of Appeal at Banaras. The Sadar Diwani Adalat was vested with the same jurisdiction, powers and authorities in the province of Banaras as it enjoyed in the provinces of Bengal, Bihar and Orissa. (Reg. X of 1795)

In the field of criminal law and justice, the Judges of the Diwani Adalats were vested with the powers of Magistrates which were similar to those vested in the Magistrates of Bengal, Bihar and Orissa. (Reg. XVI of 1795).

The Provincial Court of Appeal at Banaras was also to act as the Court of Circuit for the trial of criminal offences. Its powers were to be the same as enjoyed by the parallel institutions in Bengal, Bihar and Orissa (Reg. XVI of 1795). The jurisdiction of the Sadar Nizamat Adalat at Calcutta was extended to the province of Banaras. The one interesting feature of the judicial system at Banaras was that, in consideration of the high respect paid by the Hindu inhabitants to their character, the Brahmins of Banaras were given some special indulgences in the mode of proceeding against them on criminal charges. Regulation XVI of 1795 provided: 'No Brahmin shall be punished with death. In cases in which a Brahmin shall be declared by the law liable to suffer death, he shall, in lieu of such punishment, be subject to be sentenced by Nizamat Adalat to transportation. The Court of Circuit is not to pass sentence in any such trials, but it is

to forward them to the Nizamat Adalat, for their final sentence.' (Sec. XXIII).

The institution of Native Munsiffs and Registrars was extended to Banaras on the same lines as in Bengal.

The introduction of the Adalat System in Banaras so as to ensure to the inhabitants equal protection of person and property, was a very solid achievement of Sir John Shore's administration.

CHAPTER XII

PROGRESS OF THE ADALAT SYSTEM WELLESLEY—AMHERST (1798-1827)

FURTHER RESTRICTIONS ON APPEALS TO THE SADAR DIWANI ADALAT

In 1797, during the regime of Sir John Shore, a restriction was placed[1] on appeals from the Provincial Courts of Appeal to the Sadar Diwani Adalat. Originally, under the Regulations of 1793, appeals lay to the Sadar Diwani Adalat from all decrees of the Provincial Courts, in cases where the value exceeded one thousand rupees. These appeals being found to occupy too much of the Sadar Court's time, the limitation for appeal was, in 1797, extended to suits for *money or personal property* not exceeding five thousand rupees in amount or value. This limitation had left untouched the question of cases involving *real property*, appeals in such cases lying to the Sadar Adalat, as usual, if the subject matter happened to be over one thousand rupees.

The limitation on appeals imposed in 1797 was found insufficient to answer effectually the purposes thereby intended. The number of appeals to the Sadar Court did not go down substantially. Further, it was no longer necessary to continue the distinction in appeals involving *personal property* and appeals involving *real property*.

By Regulation *V* of 1798, during Wellesley's governor-generalship, the limitation on appeals came to be extended likewise to real property of the same estimated value. The decisions of the Provincial Courts of Appeal were declared to be final in cases where land or other real property, not exceeding five thousand sicca rupees in value, was involved.

From the Provincial Courts of Appeal, henceforth, appeals lay to the Sadar Diwani Adalat in all cases where the subject matter exceeded five thousand rupees.

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1. See page 218.

CHANGE IN THE CONSTITUTION OF THE SADAR ADALAT

Hitherto, the Sadar Diwani Adalat was composed of the Governor General and members of the Council, assisted by the Head Kazi and two Muftis. The Governor General in Council had various other public duties to discharge, and this caused unavoidable delays in the proceedings of the Sadar Court.

Notwithstanding the limitations on appeals, the accumulation of undecided causes unavoidably increased so as to require more time for their decision, than the Governor General in Council could conveniently spare from their various other duties.

The same observation was true of the proceedings in the Sadar Nizamat Adalat. This superior Court of criminal jurisdiction was also composed of the members of the Supreme Government assisted by the native law officers.

Lord Wellesley commented on this aspect of the problem in his despatch to the Court of Directors, dated July 9th, 1800 :

'A conscientious discharge of the duties of the Sadar Diwani Adalat, and the Nizamat Adalat, would of itself occupy the whole time of the Governor General in Council.

'The proper duties of these Courts are not confined to the determination of the causes which are brought before them. It is also their duty to superintend the conduct of all the other courts, to watch over the general police of the country, and to frame for the consideration of the Governor General in Council new laws as cases may arise demanding further legislative provisions.

'When your Honourable Court shall advert to the extent of your dominions, to their population to their growing prosperity, and to the consequent multiplied concerns of individuals it will atonce be evident that it is *physically impossible that the Governor General in Council can ever dedicate that time and attention* to the duties of these courts, which must necessarily be requisite for their due discharge.'

This circumstance was sufficient to divest the Governor General in Council of the responsibility of attending to the work of the two Sadar Adalats, and appointing *distinct Judges* to preside over those Courts. But there were many more circumstances which suggested emphatically the necessity and expediency of adopting that measure.

The Governor General in Council along with their judicial powers as constituting the Sadar Courts, exercised also the whole of the executive and legislative authority. There were grave and fundamental objections to this sort of a union of powers in the administrative machinery of the country. Many of the progressive and civilized countries have adopted the principle of separation of powers, if not fully, at least to the extent of making the judiciary independent of the executive, and Lord Wellesley realised the value of this principle. His comments on the prevailing system were as follows :

'There are no circumstances however connected with our political situation in this country, which require that the Governor General in Council should continue to exercise any portion of the judicial authority.

'It is equally necessary to the happiness of the people, to the prosperity of the country, and to the stability of the British Government, that such laws as the Governor General in Council may sanction in his legislative capacity, should be administered with ability, integrity, impartiality and expedition.

'All the provisions made by the British constitution for precluding the legislative and the executive powers of the state, from any interference in the administration of the laws, are not only applicable to the government of this country, but, if it were possible, demand to be strengthened.

'An efficient control may be exercised from England over the conduct of the Governor General in Council, in his legislative capacity. But no effectual control can be exercised over him in the administration of the laws, and he may render the laws altogether nugatory by abuses, omissions, or delays in their administration.

'It is essentially necessary that the *security of private rights and property* should be rendered *altogether independent* of the characters of those who may be occasionally placed at the head of your affairs in this country. This, however, can never be the case, while the Governor General in Council who makes the law, and whose acts in the executive capacity, as well as those of the long train of officers who exercise authority under him in that capacity also, constitute the chief courts which control the general administration of justice.

'No inconvenience can arise from divesting the Governor General in Council of all immediate interference in the administration of the laws, while he has the power of altering at his pleasure the law itself.

'These *objections* to the exercise of any judicial power by the Governor General in Council, are founded on *general and established principles of government*; but other considerations render this duty incompatible with the proper functions of the Governor General in Council.

'The administration of justice in open court, is one of the principal securities for its due administration.

'The constant appearance of the Governor General in Council in an open court of justice would be incompatible with that dignity which, to render him competent to the conduct of the government, it is essentially necessary that the person invested with the supreme executive and legislative power should maintain, not only in the estimation of the people immediately subject to his government, but also of the foreign powers.

'The presence of the Governor General in Council in open court, would prevent the pleading of causes with becoming freedom. No native pleader would venture to contest his opinions, and the will of the Governor General, and not the law would be considered as the rule of decision.

'As the Governor General must necessarily be often unacquainted with the languages of the country, this circumstance alone would render it impracticable for him to preside at

trials in open court, unless it should be determined that the trials should be conducted in English, and by English pleaders.

'In consequence of these circumstances, the Courts of Sadar Diwani Adalat, and Nizamat Adalat are held in the council chamber. Neither the parties nor their pleaders are in any cases present. The proceedings are translated into English, and read to the members of the Court who pass their decision, which the register records.

'The necessity of making these translations constitutes the chief cause of the delay in the decision of the causes which are brought before the chief civil and criminal courts. The translations cannot however be dispensed with for the reasons above stated. They are also requisite for record and transmission to England, as they now constitute the only check on the Governor General in Council in the administration of the law; but for these considerations, no translations of the proceedings on trials would be necessary'.[1]

As the system stood, there was absolutely no check on the exercise of the judicial power by the Governor General in Council. Thus a Government, disposed to abuse its trust, possessed in India the means of abuse without impediment.

To ensure an impartial, prompt and efficient administration of justice, and also to provide for the permanent security of the person and property of the native inhabitants of the Provinces under British control, the Government of Lord Wellesley came to the conclusion that *the judicial functions must be discharged by means of Courts of Justice which should be distinct from the legislative and executive authority of the State.* This beneficial and wholesome reform was effected by Regulation III of 1801, which provided that:

1. The Sadar Diwani Adalat was to be presided over by three Judges;

2. The Chief Judge was to be a member of the Council,

1. *Italics mine.*

to be selected and appointed by the Governor General in Council. Neither the Governor General nor the Commander in Chief was to occupy this office. Some other member of the Council was to be appointed as the Chief Judge:

3. The other two Judges[1] were to be selected and appointed by the Governor General in Council from among the covenanted civil servants of the Company, not being members of the Supreme Council; only those having experience of the judicial work in the Provincial Courts were to be appointed:

4. The constitution of the Sadar Nizamat Adalat was to be the same as that of the Sadar Diwani Adalat, the same set of three Judges presiding over both the Courts.

The arrangement was a welcome change, being necessary for the prompt and pure administration of justice and the welfare and prosperity of the country. The process of separating the judiciary from the executive was initiated by Lord Cornwallis, but it was taken to its logical conclusions only by Lord Wellesley. By effecting separation of the judicial authority vested in the Sadar Courts, from the executive and legislative authorities of the State, Marquis Wellesley put the keystone to the fabric of the system of law and justice of which the foundations were laid by Cornwallis in 1793.

FURTHER CHANGE: 1805

In 1805, Lord Cornwallis reached India to assume the reins of the Government for the second time. His tenure of office this time was very short as he died in India in the same year.

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1. Lord Wellesley proposed a sum of Rs. 55000/- per annum as the salaries of the two Judges besides the Chief Judge. Justifying this he observed: 'Considering the importance of the duties of the Judges of the new Courts, the eminent qualifications required for the discharge of those duties, and the elevated situation in which the persons appointed to those offices are placed, the Governor General in Council is persuaded that it would have been consistent with good policy to have fixed the allowance of the two Judges on a higher scale. But the state of the public finances induced His Excellency in Council to limit the salaries to the amount above stated .....'.

The one significant development during this period was the carrying further, to its last stage, the policy of separating the judicial functions from the executive functions. Lord Wellesley had left the Office of the Chief Judge of the Sadar Adalats to a member of the Council. Lord Cornwallis did away with this practice. No longer was the Chief Judge of the Sadar Adalats to be a member of the Council. Being a covenanted civil servant of the Company, he was to be *distinct* from the Governor General's Council.

The change had been necessitated by several factors. In 1803 the jurisdiction of the Sadar Adalats had been extended to the provinces ceded by the Nawab Vizier[1], and in the course of the following two years, to the conquered provinces and Bundelkhand. In consequence, work before the Adalats increased considerably. The various important and laborious duties of the Supreme Government rendered it impossible and impracticable for any of its members to discharge the extensive and arduous duties of the Chief Judge of the Sadar Courts.

Moreover, the exercise of the functions of the Chief Judge of the Sadar Adalats by a member of the Supreme Council was not only liable in a great degree to the objections which existed to the exercise of the functions of Judges of those Courts by the Governor General and the members of the Supreme Council collectively, but was all the more exceptionable on grounds connected with the nature of the relations subsisting between such Chief Judge as a member of the Supreme Council, the executive branch of the Government, and the Governor General and the other members of that branch of the Government.

CHANGE IN 1807

In the year 1805, the two Sadar Adalats became distinct from the Executive Government of the country. In 1807, however, this policy received a setback. The Government by Regulation XV, 'enacted to modify the constitution of the Courts of Sadar Diwani Adalat and Nizamat Adalat' so far as it related to the appointment of the Judges of those Courts,

1. See page 231.

laid down that the two Courts should in future consist of a *Chief Judge, being a member of the Supreme Council,* but not the Governor General, nor the Commander in Chief, and of *three puisne Judges* to be selected from among the Company's servants. This Regulation, passed on 23rd July, 1807 during the regime of Lord Minto, increased the strength of the Sadar Adalats from three to four Judges. The policy of having a member of the Council as the Chief Judge was reverted to. The reasons for this step are not clear. There was a simple statement that 'it has been deemed advisable to modify the provision....respecting the appointment of Judges of the Courts of Sadar Diwani Adalat and the Nizamat Adalat'.

CHANGES OF 1811-14

The step of 1807 was evidently a retrograde one. The sounder policy of 1805 was, however, reverted to in 1811. The increased number of trials in the Sadar Courts rendered it necessary that the number of Judges of the Courts should be augmented. Regulation XII of 1811, therefore, provided for increasing the number of Judges of the Adalats 'according as may from time to time appear necessary for the dispatch of business of those Courts.' The Adalats were in future to consist of a Chief Judge, and of as many puisne Judges as the Governor General in Council might from time to time deem necessary to meet the demands of the work before the Adalats. This Regulation did not lay down, as the necessary qualification of the Chief Judge, that he should be a member of the Supreme Council.

In 1814, the Government thinking it expedient that such persons only 'as may have been previously employed during sufficient periods in the discharge of judicial functions should be hereafter appointed to the office of Judge in the Sadar Diwani Adalat and the Nizamat Adalat', laid down vide Regulation XXV that 'no person shall be deemed qualified to be appointed to the office of a Judge of the Sadar Diwani Adalat and the Nizamat Adalat, unless he shall have previously officiated as Judge of a provincial court of appeal, or of a court of circuit, for a period of not being less than three years,' or

unless he 'shall have been previously employed in the Judicial Department, or in offices requiring the discharge of judicial functions whether of a civil or criminal nature, for a total period not being less than nine years.'

The arrangement thus made in 1814 remained in force during the rest of the Company's period. The Sadar Courts continued to function up to 1862 when they were merged in the High Court of Judicature at Fort William created in Bengal under the *High Courts Act of* 1861.

EXTENSION OF THE ADALAT SYSTEM TO CEDED AND CONQUERED PROVINCES.

By a treaty dated the 20th November 1801, the Nawab Vizier ceded to the Company, in perpetual sovereignty, an extensive and populous tract of country in the Subahdary of Oudh. These provinces were officially designated as 'the ceded districts of Oudh'.

The strong encomiums which had uniformly been bestowed on Lord Cornwallis' institutions, probably, influenced the Government's decision, by which the Bengal Regulations were introduced into the ceded provinces of Oudh, on 24th March, 1803.

The ceded territory was divided into seven districts, viz., Moradabad, Bareilly, Etawah, Furruckabad, Cawnpore, Allahabad and Goruckpore. In each district, a Diwani Adalat to decide civil and revenue suits, was established with a covenanted civil servant of the Company as the Judge. All executive officers were declared amenable to these Courts for any act done in their official capacity in opposition to any established Regulation. The Government also made itself liable to be sued if any individual thought himself aggrieved by any act done by any officer of the Government in pursuance of a special order from the Governor General in Council. All these provisions, it may be noted, were on the same lines as those of 1793 in Bengal. (Regulation II of 1803).

To afford redress against unjust or erroneous decisions of

the Diwani Judges, a Provincial Court of Appeal was established at Bareilly. (Regulation IV of 1803).

By Regulation V, the Sadar Diwani Adalat at Calcutta was authorised to try appeals from the decisions of the Provincial Court of Appeal at Bareilly. The jurisdiction of the Sadar Adalat became extended over the ceded provinces and all Civil Courts established therein.

The Judges of the Diwani Adalats were also to act as Magistrates (Reg. VI). A Court of Circuit for the trial of persons charged with crimes in the ceded provinces was established at Bareilly, it being identical with the Provincial Court of Appeal (Reg. VIII). The jurisdiction of the Sadar Nizamat Adalat was extended to these Provinces (Reg. VIII).

Provisions were made for the appointment of vakeels and pleaders on the same basis as in Bengal. (Reg. X). Registers were authorised to decide cases up to Rs. 200, on a reference being made to them by the Diwani Judge. (Reg. XII).

To relieve the Diwani Adalats, as far as it was practicable, from the trial of petty suits, to afford the parties an opportunity of obtaining a speedy adjustment of such suits, without subjecting themselves or their witnesses to the inconvenience and expenses attending a long absence from their homes, and to expedite the decision of causes of every description, Regulation XVI made provisions for the appointment of Munsiffs and Sadar Ameens for deciding cases up to Rs. 50 and Rs. 100 respectively. Appeals from their decisions lay to the District Diwani Adalat. Other provisions in this behalf were practically the same as in Bengal.

In course of time the Company conquered certain territories from the Scindia and the Peshwa. These territories were divided into five zillas, viz. Aligarh, Saharanpore South, Saharanpore North, Agra and Bundelkhand. By several Regulations, IX of 1804 and VIII of 1805, during the governor generalship of Lord Wellesley, the same system for the

administration of justice as prevailed in Bengal, was extended to these territories.

DIWANI ADALATS UNDER WELLESLEY

The various measures of Shore[1] failed to provide any tangible relief to the Courts. Their effect was purely temporary. Within a very short time, the same old phenomenon of accumulation of arrears of suits in the Courts re-appeared. In the year 1801, again the number of causes undecided was so great, as to attract the notice of the Court of Directors, who, in their letter dated the 23rd March expressed their desire to the Government of Bengal that steps might be taken for reducing this number. The figures available of the suits pending at the time before the various Courts in the country indicated the position to be very serious. The number of causes pending on 1st January 1802, before the five Courts of Appeal, was 882 ; before the Judges of the Diwani Adalats, 12,262 ; before the Registrars of these Courts, 17,906 ; and before the Native Commissioners, 131,929.

The number of causes decided in the preceding year was : Courts of Appeal, 667 ; Diwani Adalats, 8,298 ; Registrars, 14,124 ; Native Commissioners, 328,064.

The number of suits decided by the Judges and the Registrars in one year appeared almost to be incredible. Similary, the number of suits decided by the Native Commissioners—though they were mostly petty suits, the greatest of them not exceeding the value of fifty rupees, and were determined probably in a summary manner—was, nevertheless, such as might excite some surprise. One explanation, for the disposal of the vast amount of judicial business was that the Government, in its anxiety to keep down accumulation of work, urged the Courts to expedite their proceedings. The number of suits disposed of, rather than the quality of work done, came to be regarded as the test, criterion of efficiency. There was a race on the part of the Courts to cope with the increasing mass of judicial work before them. With the result, their quality of work

1. See Chapter XI.

suffered. They did their work summarily. The accumulation of undecided causes was, undoubtedly, a great evil. But there was evil, too, in the haste with which efforts were being made to keep down the accumulation. There was a tendency to estimate the zeal and efficiency of judicial officers, not by the soundness of their decisions, but by the number of them. The *foot rule system*, encouraged by the higher authorities, was a false test to judge the efficiency of the judicial officers. One evil thus begot another evil.

However, all the expedients, hitherto employed, failed miserably. The number of pending causes did not at all diminish. The means, adopted or resorted to for that purpose, were not as successful as was expected. A letter from the Bengal Government of 30th September, 1803 stated that although the aggregate number of suits pending throughout the provinces, on the 31st December, 1802, was considerably less than the number pending on the 31st June preceding, yet 'it had been found impracticable to reduce the number of depending causes, at some of the courts, sufficiently for the purpose of ensuring to the parties a prompt decision on their claims; and that this accumulation of business had taken place, in the zilla courts of Tirhoot, Dacca, Jellalpore, and Bihar; where it appeared, that the number of causes depending, exceeded the number which had been decided, or dismissed from the file, in the course of the five preceding years'.

The number of causes pending before some of the Judges, was so considerable that great delay was bound to occur in their investigation and decision.

In 1803, Lord Wellesley tried to improve matters by adopting the more direct expedient of *increasing the number of Courts in the country*. His scheme was embodied in Regulation 49 of 1803. The salient provisions of this scheme were:

(i) The accumulation of causes in the Courts, in the opinion of the Government, had chiefly 'proceeded from accidental circumstances, the effect of which may be removed by a temporary arrangement for

the trial and decision of causes in arrear, without a permanent alteration of the established jurisdictions'. The Government, therefore, thought it expedient to make provisions for the occasional appointment of an *Assistant Judge,* to assist in the trial and decision of causes depending before the Judge of the Diwani Adalat of any zilla or city, in which such an appointment might be required.

The Assistant or Additional Judges were to be appointed only in those places where the number of pending causes made it necessary to do so. The appointment of such a Judge was to be purely temporary. He was to decide such cases as were referred to him by the Diwani Judge. His appointment was to cease when the arrears of causes had been reduced sufficiently.

(ii) To expedite the general administration of justice in the zilla and city Diwani Adalats, the Government thought it expedient to alter and enlarge the jurisdiction of the Registers, so that the Judges might be able to refer for trial, in the first instance, to their Registers, suits *exceeding* in amount or value 'the sum to which they are at present restricted in such references.'

Up till 1803, Registrars were authorised to take into cognisance civil cases in which subject matter did not exceed Rs. 200. Now, they were authorized to decide causes up *to a value of Rs.* 500, if the cases were referred to them by the Diwani Judge.

The decisions of the Registrars were not final. Appeals lay to the Diwani Judge as such cases might sometimes involve questions of general and important nature.

(iii) To expedite the administration of justice, provisions were made for the appointment of a *Head Native Commissioner* in any zilla or city wherein such appointment might appear advisable. These Native Judges were to be known as *Sadar Ameens.*

The Sadar Ameen was to maintain his Court at the head-quarters of the district with judicial powers to try cases up to *a value of Rs.* 100 referred to him by the Diwani Judge.

The Sadar Ameen was to be nominated by the Diwani Judge and approved by the Sadar Adalat. The Judge was not restricted in his choice to any particular descriptions of persons. He was required to be particularly careful to select persons of good character and known ability, as well as duly qualified by their education and past employments to discharge satisfactorily the trust reposed in them.

The Sadar Ameens did not constitute any regular salaried service. As compensation for his labours, the Sadar Ameen was to get, on his deciding a suit referred to him, *the fee of one anna per rupee.* If in any case, this allowance was found to be insufficient, the Governor General in Council might sanction such addition thereto as appeared requisite for the encouragement of well qualified persons to hold the office of Sadar Ameens and to perform the duties of this office with diligence and fidelity.

The institution of Sadar Ameens represented the *second stage in the evolution of the native Judiciary,* as Indians came to have somewhat larger judicial powers than what they had hitherto possessed.

(iv) Lord Cornwallis had introduced native Judicial Officers in the form of Munsiffs, who were authorised to decide cases up to Rs. 50. The Courts of the Munsiffs, or Native Commissioners as they were also known, were interspersed throughout the district. These Courts provided an important link in the judicial arrangements as they made an easy access to justice possible. The efficacy of these Courts lay in the fact that they were not concentrated or clustered together at one principal place in the district. On the other hand, they were so arranged as to enable suitors in quest of justice in the interior of the country to reach them without undertaking any long and arduous journey.

Wellesley continued the institution of Munsiffs with certain improvements.

Hitherto, the selection of Munsiffs was restricted to zemindars and other landholders who exercised their jurisdiction as Munsiffs over their under-renters and ryots in the estate. This power was chiefly intended for the assistance of landholders and farmers of land in the recovery of arrears of rent from their under-tenants. Since the days of Cornwallis, more effectual means had been provided for the purpose of collecting arrears of rent. It was, therefore, no longer necessary to reserve the office of Munsiff for the particular and exclusive aid of the landholders and farmers in the recovery of arrears of rent. On the other hand, certain abuses had arisen from the indiscriminate exercise of the powers of Munsiff by the zemindars and landholders, and so, the Government thought it expedient to divest them of these powers. At the same time the general convenience of inhabitants, especially of those who resided at a distance from the Diwani Adalats, was expected to be much promoted by the appointment of well qualified persons as Munsiffs. Accordingly, in 1803, it was laid down that the Munsiffs were to be nominated by the Diwani Judge and approved by the Sadar Diwani Adalat. In the selection, the Judge was no longer to confine himself to zemindars or landholders only ; persons of known ability and education were also to be appointed. The sphere of choice for the appointment of Munsiffs was thus enlarged. Appeals from the Munsiffs, as usual, lay to the Judge of the Diwani Adalat.

Thus the Courts of civil jurisdiction established at the end of 1803 in each district and each of the three cities[1] of Bengal, Bihar and Orissa were :

(i) Munsiffs : They were native Judicial Officers having jurisdiction up to Rs. 50. Appeals from their decisions lay to the Diwani Adalat.

(ii) Sadar Ameens : Appeals from them lay to the

1. Patna, Murshidabad and Dacca,

Diwani Adalat; They, too, were Native Judges, having jurisdiction up to Rs. 100.

(iii) Registers: They were English Judges having jurisdiction up to Rs. 500; Appeals lay to the Diwani Adalat.

(iv) Diwani Adalat: Appeals lay to the Provincial Court of Appeal. There was one such Court in each district. It was presided over by an English Judge.

(v) Assistant Judges: They were English Officers appointed to assist the Diwani Adalat; Appeals lay to the Provincial Court of Appeal.

From the Provincial Courts of Appeal, appeals lay to the Sadar Diwani Adalat in all cases involving a subject matter of over Rs. 5000 in value.

CHANGE IN 1808

A change occurred in 1808 in the mutual relationship of the Provincial Courts of Appeal and the Diwani Adalats in zillas and cities. Under the scheme prevalent hitherto, all civil causes were instituted in the Diwani Adalats, excepting suits up to Rs. 50 which could be received directly by the Munsiffs. In all causes tried by the Diwani Adalats, an appeal lay to the Provincial Courts of Appeal; in causes exceeding Rs. 5000 a further appeal was open to the Court of Sadar Diwani Adalat.[1] In this way, there were two appeals in causes of five thousand rupees or above. This arrangement caused considerable delay in the final disposal of such cases. The Government regarded it advisable that all causes ultimately appealable to the Sadar Diwani Adalat should be made originally cognizable by the Provincial Courts of Appeal instead of the Diwani Adalats. Such a step, it was expected, would be advantageous to the parties concerned in such causes. The speedy decision of other suits was also expected to be promoted as the Diwani Judges would thus be relieved of a part of their duties.

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1. See page 222.

Regulation XIII of 1808 thus conferred an *original civil jurisdiction* on the Provincial Courts of Appeal in all cases above 5000 rupees. Such cases were to be directly instituted in the Provincial Courts, the appeal to the Sadar Diwani Adalat being first and final except where an appeal lay to the Privy Council under the Act of Settlement in cases beyond £5000 or 50,000 rupees.[1]

The Diwani Adalats were discharged from the obligation of trying causes over 5000 rupees. They were to try causes only below that amount. This change occurred during the tenure of Lord Minto as the Governor General.

LORD HASTINGS' PLAN OF 1814

The Governor General, Lord Hastings, expressed his confident hope that the judicial measures of 1803 would have a 'material tendency' to expedite the decisions of civil suits throughout the country. Unfortunately, the expectations were not fulfilled. The scheme of 1803 failed to achieve the object in view. It did not relieve the situation, which continued to be as grim as before. Courts were overwhelmed with work as usual.

The Court of Directors, in their dispatch to the Government of Bengal, dated 14th September 1803, commented on 'the almost *incredible* number of causes undecided, that to judge by analogy of the courts of Europe, they would be induced to think so great an arrear could scarcely ever come to a hearing.' The matters did not improve, for in 1812 the Court of Directors again commented on the accumulation of work: 'We should be sorry, that from the accumulation of such arrears, there should ever be room to raise a question, whether it were better to leave the natives to their own arbitrary and precipitate tribunals, than to harass their feelings, and injure their property, by an endless procrastination of their suits, under the pretence of more deliberate justice.' These remarks speak volumes of the disturbing state of affairs

1. See pages 117, 177.

prevailing in the judicial tribunals from the point of view of the arrears of work.

On the eve of the renewal of the Charter of the Company in 1813, the Select Committee of the House of Commons on the affairs of the East India Company in its *fifth report* in 1812, observed, 'Although the foregoing circumstances evince the solicitude with which the Bengal Government have endeavoured to afford the natives of those provinces, a ready decision of their suits, and to enable the Judges of the different courts, to keep down the number of causes on the file within moderate limits; yet it must be confessed, that these objects are by no means so nearly attained, as to render their further exertions unnecessary'. The Committee drew attention to the various evils that were arising in the country due to the delays of justice. The nature and intensity of the evils depended upon the nature of the dispute, and the character of the people among whom they arose. Many persons were tried for the breaches of peace arising from boundary disputes and other contests concerning landed property. The Judge of Circuit ascribed this to the great arrears of untried causes pending in some of the Courts; since by necessarily protracting for years, the decisions of suits, it frequently drove the suitors to despair, and induced them to run the risk of taking justice into their own hands, by seizing the object in dispute, rather than await the tardy issue of a process, which threatened to exceed the probable duration of their own lives.'

The real cause of the failure of the attempt to administer real and quick justice to the people, and the mainspring of the delay—which led to extortion and bribery—was the *inadequacy of the judicial system* which established, on an average, one court where there ought to be three or four. Until this was remedied all attempts at improvement were bound to be unfruitful. The obvious plan would have been to have established a sufficient number of courts to perform the judicial business.

On this head the Select Committee of the House of Commons in its *fifth report* in 1812 suggested that with respect to

suits of small amount, the Native Commissioners to whom they were referable, 'may be indefinitely increased in number, at no expense to the state.' But it further said, 'An augmentation of the number of European Judges, *adequate* to the purpose required, would be attended with an augmentation of charge, which the state of the finances is not calculated to bear....' It was an extraordinary pronouncement. The plea of inadequate finances was again being used to defer the essential and elementary reforms in the judicial machinery of the country. Well did Mill observe, 'Never since man had the use of language, was a more terrible condemnation on any government pronounced. Of all the duties of the government, *that of maintaining justice among the people is the foremost.* This is, in fact, the end for which it exists. Here is said to be a government which raises upon the people a revenue so vast that by avowed intention it is all that they can bear; that is, oppressive to the highest pitch which oppression can reach without desolating the country; till not a sufficiency remains to hire judges for the distribution of justice. What is made of all this money? To what preferable purpose is it applied? High matter, in large quantity, would be contained in a proper answer to these questions.'

It is not necessary to go far to seek answers to these questions. The money was wrung from the unfortunate people of India, and either squandered away, or sent to England to increase the profits of the Court of Directors.

In 1814, however, Lord Hastings gave shape to the suggestions of the Select Committee in its *fifth report* to increase the number of Munsiffs and Sadar Ameens. Regulation XXIII of 1814 was passed for this purpose. The preamble set forth the following purposes to fulfil which the Regulation in question was passed:

(i) From time to time rules had been enacted in the past for constituting the office of Munsiffs and Sadar Ameens for the trial and decision of causes of a certain amount or value, and these rules appeared in some instances to require revision;

(ii) It was expedient with the view of expediting the trial and decision of civil suits, to extend the jurisdiction of the Munsiffs and Sadar Ameens ;

(iii) In the interest of public convenience it was thought requisite to transfer to the Provincial Courts of Appeal the control heretofore exercised by the Sadar Diwani Adalat in the appointment and removal of Munsiffs and Sadar Ameens ; and

(iv) It was expedient to consolidate and reduce into one Regulation all the provisions which would be applicable to the office of Munsiffs and Sadar Ameens.

The Regulation XXIII of 1814 made, *inter alia*, the following provisions :

1. The local jurisdiction of the Munsiffs was to be so arranged as to correspond exactly with those of the *thanas* or local police jurisdictions ; in this way the number of Munsiffs was increased.

2. The recommendations for the appointment of particular individuals as Munsiffs were to be made by the Diwani Judges for the approval and sanction of the Provincial Courts of Appeal.

3. In nominating the individuals for the office of Munsiffs, the Diwani Judges were not to be restricted to any particular classes or descriptions of persons.

4. Whenever the Diwani Judge saw cause for the removal of a Munsiff on the ground of any misconduct, neglect of duty, incapacity or other disqualification, the Judge was to report the circumstances of the case with his opinion on the subject to the Provincial Court of Appeal, who might pass such orders on the report as might appear to it to be proper.

5. The Munsiffs were empowered to receive, try and determine all suits for money or personal property, against any native inhabitant to the tune of Rs. 64. In this way, the jurisdiction of the Munsiffs was slightly enlarged. Previously they could decide suits up to Rs. 50 only.

6. The Munsiffs were not themselves to enforce their decrees. The authority in this behalf was conferred on the Diwani Judge.

7. The decisions of the Munsiffs were not to be final. Appeals from them lay to the Diwani Judge. The decisions of the Munsiffs were not, however, to be set aside for 'want of form or for irregularity in their proceedings', but only on merits.

8. The Regulation prescribed detailed rules of procedure for the Munsiffs to follow in their Courts.

9. The Munsiffs *were not to be regular salaried officers* of the Government. Instead, they were to be reimbursed on a commission basis for the suits actually disposed of by them.

10. Sadar Ameens were to be appointed in the zillas and cities for the trial and disposal of civil suits. The number of Sadar Ameens to be employed in each zilla or city was not fixed. The Provincial Courts of Appeal could at all times exercise their discretion in increasing or decreasing their number after considering the state of civil business and other local circumstances.

11. Selection of individuals for the office of Sadar Ameens was to be made by the Diwani Judge to be approved by the Provincial Court of Appeal. For this selection, the choice of the Judge was not restricted to persons of any particular class or religion. However, the selection was to be made very carefully so that only those persons who were best qualified for the trust came to be appointed.

12. The jurisdiction of the Sadar Ameens was raised. Previously they could hear and determine suits up to the value of Rs. 100. After 1814, the Diwani Judge was authorised to refer to the Sadar Ameens for trial and decision any original suits for money or other personal property, not exceeding 150 rupees in amount or value.

13. No suit was to be referred to the Sadar Ameens in

which a British European subject, or a European foreigner, or an American might happen to be involved.

14. Appeals from the decisions of the Sadar Ameen were to lie to the Diwani Judge.

Regulation XXIV of 1814 effected certain other modifications in the constitution and jurisdiction of the Courts.

1. The office of the Assistant Judge, which had been created as a temporary measure by Lord Wellesley,[1] was abolished.

2. The Diwani Judge could try cases only up to Rs. 5000. All cases beyond that limit were to be tried by the Provincial Court of Appeal as a Court of first instance. This change had already been effected as early as 1808.[2]

3. Appeals from the Diwani Adalat lay to the Provincial Court of Appeal. In cases, tried originally by the Provincial Court, appeals lay to the Sadar Diwani Adalat. Appeals from the Registrars were to lie to the Diwani Adalat. In this way, there was to be only one appeal in every case irrespective of the value of the subject matter.

4. The Diwani Judge could refer to the Registrar cases up to Rs. 500. Appeals in such cases lay to the Diwani Adalat only.

5. It was further provided that the Governor General in Council could invest the Registrar of any Diwani Adalat with special powers when there was pressure of work in the Diwani Adalat and where the Registrar happened to be duly qualified. A Registrar so invested was authorised to try cases over Rs. 500 if the Diwani Adalat referred the cases to him. In such cases, appeals lay directly to the Provincial Court of Appeal.

Regulation XXV of 1814 happened to confer more extensive original jurisdiction on the Sadar Diwani Adalat and the

1. See page 233.
2. See page 237.

Provincial Courts of Appeal. It was requisite, with a view to expedite decision of civil causes, to make certain modifications in the rules then existing[1] regarding the jurisdiction of those Courts in the trial of original suits. Accordingly, the following rules were enacted :

1. All original regular civil suits, where the value did not exceed 5000 rupees were to be instituted in the District or City Diwani Adalat. However, if from pressure of work in any Diwani Adalat, it appeared that suits exceeding 1000/- in value could be more conveniently and expeditiously tried, in the first instance, by the Provincial Court of the Division than by the Diwani Adalat before which they might be pending, it was to be competent to the Sadar Diwani Adalat to order the *transfer of all or any of such suits to the Provincial Court.*

2. All original regular suits in which the value or amount of the claim exceeded 5000 rupees were to be instituted and tried in the Provincial Courts. But if at any time it appeared to the Sadar Diwani Adalat that, from pressure of business in any of the Provincial Courts, suits amounting to 50,000 rupees or above, being the amount fixed for appeals to the King in Council, could be tried more conveniently or expeditiously in the first instance by the Sadar Diwani Adalat than by the Provincial Court, it was to be competent to the Sadar Diwani Adalat to order the transfer of all or any such suits from the Provincial Court of Appeal to the Sadar Diwani Adalat.

SUMMARY OF THE ARRANGEMENTS—1814

The judicial system as left behind by Lord Hastings was on the following lines :

1. Munsiffs : They were Indian Officers who were entitled to try cases up to Rs. 64. Every district had a number of such Judges. Appeals from them lay to the Diwani Adalat.

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1. See page 237-238

2. Sadar Ameens: They also were Indian Judges who were entitled to try cases up to Rs. 150. They had their Courts at the same station as the Diwani Adalat was situated. Appeals from them lay to the Diwani Adalat.

3. Registrars: Ordinarily they were entitled to try cases up to 500 rupees; The Governor General in Council could, however, authorise any Registrar to try cases of a higher value. Appeals from decisions in cases involving Rs. 500 lay to the Diwani Adalat; thereafter, to the Provincial Court of Appeal.

4. Diwani Adalat: There was one such Court in each district and each of the three cities. It could try all cases up to Rs. 5000. Appeals lay to the Provincial Court of Appeal.

5. Provincial Court of Appeal: Its functions were (i) to hear appeals from the Diwani Adalat; (ii) to try cases over Rs. 5000; (iii) Under certain circumstances to try cases over Rs. 1000 as a court of first instance.

6. Sadar Diwani Adalat: Its functions were to hear appeals from the Provincial Courts in all cases involving over Rs. 5000. It could also try, as a court of first instance, all cases amounting to Rs. 50,000 or above.

It may be noted that by the time of Lord Hastings, right of appeal had been severely curtailed. Whereas under Cornwallis' scheme a suitor could have at least two appeals in every category of cases, under Hastings' scheme there could be only one appeal. It was only in cases amounting to Rs. 50,000 that there could be a maximum of two appeals, firstly, from the Provincial Court which tried the case in the first instance, to the Sadar Diwani Adalat; secondly, from the Sadar Diwani Adalat to the King in Council. If such a case was tried by the Sadar Diwani Adalat, as it could do under the powers conferred on it, there could be only one appeal to the King in Council.

CHANGES OF 1821

The arrangements of 1814 again failed to meet the exigencies of the situation. Due to the limited powers enjoyed by

the subordinate judicial officers, a much larger proportion of business devolved on the Zilla and City Diwani Judges than could properly be discharged by them. The Government felt that relieving the Judges from part of that business by increasing the powers of the Registers, Sadar Ameens and Munsiffs would tend to expedite the general administration of justice. Hitherto, there was one Munsiff in each thanna. This arrangement was found to be inadequate and so it had become necessary to augment it. To achieve these objects, the Government of Lord Hastings passed a Regulation in 1821 by which certain adjustments were made in the judicial arrangements of 1814.

Provisions were made for increasing the number of Munsiffs, if one Munsiff in each thanna was found to be inadequate. His jurisdiction also was extended up to Rs. 150.

The jurisdiction of Sadar Ameens was increased to five hundred rupees. No other significant change was made and the arrangements of 1814 continued to work in other respects.

LORD AMHERST

During Amherst's tenure of governor generalship, some changes calculated to raise the status of Sadar Ameens were adopted. Regulation XIII of 1824 was the first of such measures. The Sadar Ameens, hitherto, did not form a regular salaried cadre of the Company's servants. They were remunerated on a commission basis. With a view to the better administration of civil justice in suits referred for trial and decision to Sadar Ameens, as well as for the more certain and adequate compensation of these officers, the Government thought it expedient to *discontinue the mode of paying* the Sadar Ameens *.by institution fee in suits* decided by them. It was proposed *to grant them a fixed allowance* calculated to ensure a faithful discharge of duty and afford them a liberal reward for their services. A monthly salary thus came to be awarded to the Sadar Ameens as remuneration.

In 1827, the jurisdiction of Sadar Ameens was further extended. In special cases they could try cases up to Rs. 1000.

The services of the Sadar Ameens came to be very largely used for the disposal of civil cases, and several such officers were employed at the headquarters of the important districts.

WORKING OF CRIMINAL JUDICATURE AFTER CORNWALLIS

According to the Cornwallis' scheme of criminal judicature of 1790, which was continued in 1793, magisterial powers had been conferred on the Judges of the Diwani Adalats. The main function of the Magistrates was to apprehend the accused persons and commit them to the Courts of Circuit for trial. The Court of Circuit visited each district in the Division once in every six months for this purpose. The Magistrates and the Judges of the Courts of Circuit were all English servants of the Company.

The practical working of this scheme did not produce very happy results. The evils which Cornwallis' reforms created or left unremedied were in many cases similar to those which he himself had so unsparingly condemned in 1790[1]. No doubt, after 1790 the mode of conducting trials was more regular, satisfactory and decorous. The records were properly kept and made up. But apart from this, there was no other improvement. The accused persons remained in prison for several months before they were brought for trial before the Court of Circuit. Crimes of all kinds increased in the country. Dacoity, Burglary, gang robbery, murders and various other offences were committed with impunity.

There were many reasons for this sad state of affairs. Cornwallis had united the functions of the Judge and the Magistrate in the same person. *The results of this arrangement were unhappy and deplorable.* The functions of the police were sufficient to occupy the whole of the officer's attention. In the same way, the work coming before the Judge of the Diwani Adalat also was quite extensive. One person could not do full justice to both the offices. It was a very heavy burden for one man to discharge. He had necessarily to neglect one of the assignments,, and therefore, the whole

1 See page 147.

system turned out to be a great anomaly. Persons had to wait for long in the prisons before the Magistrate could complete his investigations in to the charges laid against them, and it was quite possible that some of these persons might turn out to be quite innocent. Such persons were released by the Magistrate, yet they had already suffered much in health, wealth and reputation by being lodged in prison for such a long time *unnecessarily*. Commenting on this state of affairs, the Select Committee of the House of Commons in its *fifth report* in 1812 observed: 'But the Committee have to notice the delay in the administration of criminal justice in some of the districts, arising from another cause, which is of more pernicious tendency than that experienced by those committed for trial; in as much as it affects those against whom no evidence has yet been taken, and may therefore involve, the innocent as well as the guilty. The delay here alluded to, is that which frequently occurs at the office of the magistrate, where, from press of business or other causes months are represented to elapse, before the person apprehended can be brought to a hearing; during which time, he is lodged in a crowded prison, where, not unfrequently, death overtakes the prisoner before the causes of his apprehension can be inquired into.... The evil seems to arise, from the European civil servant.... having more business on his hands, than it is possible for one person to transact. If as judge, he is impressed with the necessity of making an exertion for the reduction of the civil suits on his file, the business of the magistrate's office, is in danger of falling in arrear; and if he employs himself sufficiently in the latter, to prevent the detention of witnesses on criminal charges continually coming before him, and to commit or discharge the persons accused, the file of civil causes must of course increase..'

Further, a Magistrate had to possess great activity both of mind and body and be in a position to be on tour in the district under his charge. But he being the Judge could not leave the station without special permission of the Government. The work of arresting and apprehending criminals therefore suffered. These abuses could be eradicated by entrusting only

one office to one individual. Any system which seeks to encumber the Magistrate with extraneous duties which serve to impede the regularity and rapidity of the Magistrate's movements as an officer of the police, must always be open to serious objections.

Cornwallis had instituted four Courts of Circuit for administering criminal justice throughout the three provinces of Bengal, Bihar and Orissa. These Courts visited the districts twice a year and tried the persons committed by the Magistrates. Owing to the very limited powers of the Magistrates *to try and punish the criminals* the number of persons which they used to commit to the Courts of Circuit for trial was always very large. The Judges of the Courts of Circuit were thus called upon to discharge a large volume of work. In 1802, these Courts investigated 2820 charges, and tried 5667 persons. The average of the following five years was 5831 persons tried. The time allotted for the Court to finish one circuit was six months, there being two gaol deliveries every year. Now, assuming that the business of the year 1802 was equally divided between the Judges of the four Courts of Circuit, for any of the half yearly gaol deliveries, each Judge would, on an average, have more than 700 persons to try, and he might dispatch the business, at the rate of somewhat more than four trials per diem, if the whole six months were employed on the circuit with little time allowed for travelling from station to station. But then the work before the Courts was not equally divided. The Court of Circuit for the Division of Calcutta had to face more work. This Court in 1802 tried 335 charges, and 1182 persons, which, on an average must have required the Court to try more than seven persons each day, in order to get through the circuit in the time allotted, before the commencement of the next circuit. If a due allowance be made for the time consumed on travelling from district to district then the Court must be considered to have tried many more persons per day. The result of the heavy pressure of work was that the Court was seldom able to finish the circuit within the time allotted. The Select Committee in 1812 in its fifth report made the following comment on this point: 'But in Bengal provinces,

the Judge seldom returns to his station before it is time for his successor, to commence his circuit; and it had happened in the Dacca Division, that the Circuit has, in its duration, considerably exceeded six months. During all this time excepting what may be required by the judge in passing from one station to another, he is incessantly employed in the most arduous and important duties that can be confided to a public servant, that of conducting trials of persons charged with capital crimes.' In the Calcutta Division, instead of a gaol delivery every six months, there used to be only three gaol deliveries in two years. The very limited number of Judges of Circuit, compared with the extent of country and the number of districts which required to be visited in their respective Divisions, was such, that great delay and uncertainty occurred in the period of holding the gaol deliveries. A year, sometimes even more, often elapsed between the sessions. Even under normal circumstances, there were only two gaol deliveries every year, and the ordinary time a prisoner had to be in gaol, between his commitment by the Magistrate and his trial at the hands of the Court, was from one to five months. But as noted above, the circuits did not take place regularly once in six months. Much longer interval often elapsed between the sessions, and for all this period prisoners committed for trial immediately after the previous sessions remained in confinement, which obviously was the cause of much injustice.

Such irregular visits of the criminal judges gave no little impunity to crime. People would submit to injustice, rather than waste money and time in procuring uncertain and delayed justice and redress. People became reluctant, as they thought it foolish, to prefer any information leading to the investigation of a crime as they were afraid that it might lead to their long detention as witnesses.

The system was expensive for the Government, as it had to summon the witnesses and maintain them when in attendance on the Court. But, perhaps, the greatest objection to the delay occurring between apprehension and trial was the opportunity it gave to the accused *to fabricate* a defence

and for conspiracy either to involve the innocent, or to shelter the guilty, by means of various expedients. All this, undoubtedly, was the cause of much injustice.

Commenting on this state of affairs, several Magistrates observed: 'The trouble, loss of time and expense that attends a criminal prosecution on the present system, is, in our opinion, a serious evil, and not only induces many who have been robbed, to put up with the loss they sustain, rather than apply to the Police Officers for redress, but prevents numbers from coming forward with informations that would be highly beneficial to the community, and we have no doubt would in numberless instances be preferred, were the administration of justice more prompt and speedy than at present.'[1]

They continued: 'The consequence of this delay has been, that numbers of criminals of the most daring description, against whom, when committed for trial, there was the most full and complete evidence, have escaped, and been again let loose on society; owing to the death or illness of some of the principal witnesses, to their being collusively out of the way at the trial, or not being correct in their evidence before the court of circuit, as when the case was fresh in their memory before the magistrate.'

They observed further: 'The prosecutor is also in many instances, more indifferent as to the event of the trial, when it comes forward, than he was, at the time of his appearance before the Magistrate; threats have probably been conveyed, in a circuitous mode, both to himself and his witnesses, and they in consequence think it more politic, on their appearance before the Court of Circuit, to soften, than to urge what they have stated before the magistrate.'

Lord Cornwallis was anxious to introduce a system of speedy justice. But his measures, both in the field of civil as well as criminal justice, failed to achieve the object he had in view.

The *absence of Indian Judges* was another significant defect

1. Beng. App. Fifth Rep. 1812.

in the Cornwallis' scheme of criminal judicature. Their absence was felt most keenly in this sphere. Many of the important English functionaries of the Company adversely commented on this policy and advocated its immediate reversal. The Magistrate of Midnapur commented on this aspect of the problem in these words : 'Another impediment.....is to me, too palpable to be overlooked, I mean that arising from Europeans, in our situation, being necessarily ill qualified, in many points, to perform the duties required of us, as judges and magistrates. Nothing is more common, even after a minute and laborious examination of evidence on both sides, for the judges to be left in *utter doubt* respecting the points at issue. This proceeds chiefly, from *our imperfect connection with the natives* and *our scanty knowledge after all our study, of their manners, customs, and languages*.....I am inclined to think that *an intelligent native is better qualified to preside at a trial, than we can ever be ourselves* .....'[1] The Magistrate of Midnapur was not alone in his opinion. He found valuable support from the Court of Circuit for the Calcutta Division. These Judges observed : 'We cannot study the genius of the people, in its own sphere of action. We know little of their domestic life, their knowledge, conversation, amusements, their trades and castes, or any of those national and individual characteristics, which are essential to a complete knowledge of them. Every day affords us examples of something new and surprising ; and we have no principle to guide us, in the investigation of facts, except an extreme diffidence of our opinion, a consciousness of inability to judge of what is probable or improbable.' The evil complained of was extensive. The Judges pointed out, 'The difficulty we experience in discerning truth and falsehood among the natives, may be ascribed, I think, chiefly to our want of connection and intercourse, with them ; to the peculiarity of their manners and habits, their excessive ignorance of our characters, and our almost equal ignorance of theirs.' Under these circumstances, the administration of criminal justice in the country was bound to be *inefficient and ineffective*. In the absence of any knowledge of the native customs,

1. Italics mine

habits and language on the part of the English Judges who were entrusted with the responsibility of administering criminal justice, it was natural for them to be unable to appreciate truly the testimony and evidence of the witnesses appearing before them. Many guilty persons were thus acquitted and many innocent punished. *To increase its efficacy, it was necessary to associate more and more Indians with the system of criminal judicature.* And even though this fact had been realised by many responsible officials of the Company as early as 1800, no concrete step was taken by the Government in this direction for quite a long time to come.

It is difficult to explain the jealous care with which judicial functions in criminal matters were sought to be reserved to European officers, from the beginning : and no attempt was made to constitute even an inferior agency of native officers. In the field of civil justice, Cornwallis himself had conferred some minor judicial powers on the natives in the capacity of Munsiffs. In the sphere of criminal justice, however, not even the slightest powers were conferred on them.

CHANGES IN CRIMINAL JUDICATURE

One way to relieve the pressure of work on the Courts of Circuit was to enlarge the judicial powers of the Magistrates enabling them to dispose of a larger number of cases without any reference to the Courts of Circuit. In this way, business of the circuit could be much diminished ; trials in a majority of cases could be disposed of expeditiously, without there being any increase in the burden of the Magistrates. According to the system in force, the Magistrates had to conduct a full fledged inquiry, hearing evidence on both sides. They would commit the case to the Courts of Circuit if there was *prima facie* proof of the accused's guilt. Before the Court of Circuit the whole trial started *de novo*. All this unnecessary duplication of procedure could be avoided, if the Magistrates themselves had the power to punish the accused without referring the case to the Court of Circuit. The system of 1793 was very inconvenient to all the prosecutors, complainants and witnesses. These

persons had to reach the District Headquarters twice; firstly, at the time of inquiry before the Magistrate, and secondly, at the time of trial of the case before the Court of Circuit. Increased powers of the Magistrates would have spared many of these persons from this trouble and inconvenience.

One remarkable feature in the early Regulations was the great caution with which the administration of criminal justice was treated. The powers given at first to the Diwani Judges, as Magistrates, were even less than what are given to a third class Magistrate at the present day.

The powers of the Magistrates, however, were enlarged in 1807 in the days of Lord Minto. Regulation IX of that year empowered the Magistrates *to award sentences of six months' imprisonment with thirty rattans,* or a *fine of two hundred* rupees, commutable, if not paid, to a further period of imprisonment not exceeding six months. All those cases which merited a more severe punishment than this had to be referred to the Courts of Circuit for trial.

LORD HASTINGS

Regulation XII of 1818, enacted during the governor generalship of Lord Hastings, effected a further increase in the powers of the Magistrates. The reasons for this change were stated to be as follows:

(i) Under the existing Regulations the Magistrates were not empowered to pass any sentence of punishment upon prisoners charged with the offence of house breaking with the intent to steal, or with the offence of receiving or buying stolen goods, knowing the same to be stolen;

(ii) Much of the time of the Judges of Circuit was occupied in investigating these and some other offences, which did not demand any severe or exemplary degree of punishment;

(iii) In such cases the prosecutors and witnesses were exposed to great distress and inconvenience in being

compelled to attend, not only during the inquiry into such cases before the Magistrates, but subsequently during the trial before the Court of Circuit ;

(iv) In such cases the prisoners were sometimes subjected to a prolonged detention in custody previously to their trial at the sessions ;

(v) Some of the inconveniences would be obviated, and the ends of criminal justice more promptly and effectually obtained, by investing the Magistrates with certain powers with regard to the trial and punishment of persons charged with and convicted of such offences.

Accordingly, the Magistrates were empowered to award a sentence of imprisonment with hard labour for a period of *two years and a corporal punishment not exceeding thirty stripes.* In all other serious offences, prisoners had to stand their trial before the Court of Circuit of the Division.

The first move to entrust to the natives of the country with the power of trying criminal cases, was taken by Lord Hastings. This very desirable change was effected by means of Regulation III of 1821. The main reasons for this change were stated to be as follows :

(i) The state of public business in some districts required that the Magistrates be aided and helped by their assistants ;

(ii) It was advisable and expedient, with a view to the speedy trial and punishment or acquittal of persons charged with petty offences, and to the due administration of criminal justice in cases of a trivial nature, to empower the Native Law Officers and the Sadar Ameens, to try and determine such cases when referred to them by a Magistrate.

Whenever the accumulation of judicial business in a zilla or city rendered it impracticable for a Magistrate to discharge it with sufficient dispatch, the Magistrates could refer cases

involving petty offences for trial to the Hindu or Muslim Law officers and to Sadar Ameens. This plan, initiated in 1821, was destined to be very short-lived, for very soon after, provisions were made for the transfer of magisterial functions from the Judges to the Collectors.

COLLECTOR-MAGISTRATES

In 1821, a change of far-reaching importance which completely reversed the plan of Cornwallis, was introduced by Lord Hastings. Under the plan of Cornwallis, magisterial functions had been confided with the Diwani Judges, who were known as Judge-Magistrates. The Judge was the principal officer of the district. Hastings converted Collectors into Collector-Magistrates, making the Collector as the principal officer of the district. Cornwallis was very much against the idea of giving any judicial powers to the Collectors, for he feared that they would misuse these powers to harass the poor tenants and ryots in the country while collecting land revenue. Hastings' change by way of conferring judicial powers or magisterial powers on the Collectors was thus a complete negation of the Cornwallis' policy.

The Government enacted Regulation IV of 1821 for authorizing a Collector of land revenue or other officer employed in the management or superintendence of any branch of the territorial revenues, to exercise, in certain cases, the powers of Magistrates, and for authorizing a Magistrate to exercise in certain cases the powers of a Collector of land revenue, or any other officer employed in the management of any branch of territorial revenues. No convincing reasons were adduced for such a fundamental change of administrative policy. That such a change was thought to be *'expedient'* by the Government, was all that the preamble of the Regulation stated.

The Regulation declared : 'It shall be competent to the Governor General in Council to authorize a collector of revenue, or other officer employed in the management or superintendence of any branch of the territorial revenues, to

exercise the whole or any portion of the powers and duties vested by the Regulations in the magistrates...., or to employ a magistrate....in the collection of public revenue, and to invest the person so employed with the whole or any portion of the powers of collector of revenue, or of other officer employed in the management or superintendence of any branch of territorial revenues'

The Regulation as enacted was merely permissive. It did not effect the change all at once. It merely empowered the Government to effect the change whenever or wherever it liked. The Regulation did not say any thing about the Judges exercising the magisterial powers. Perhaps, the arrangement was not to be disturbed. It appears that the idea of enacting this Regulation was to enforce the hands of the Collectors so that they might be able to collect the arrears of revenue expeditiously and effectively. This policy of vesting revenue authorities with magisterial functions was carried much further by Lord William Bentinck.

CHAPTER XIII

THE ADALAT SYSTEM IN BENGAL—BENTINCK AND AFTER

BENTINCK

Lord William Bentinck's tenure of office as Governor General forms a notable era in the Indian History. His administration was crowded with innovations. He introduced many significant measures in the system of the Bengal Judiciary. In importance, from the Legal History point of view, Bentinck's administration figures second only to that of Cornwallis.

FIRST MEASURE—CREATION OF AN ADDITIONAL SADAR DIWANI ADALAT

One of the earliest objects which attracted Lord William Bentinck's attention was the existence of only one Court of final appeal for the whole of the Bengal Presidency, situated at the distant extremity of the provinces which composed it. The area composing the Bengal Presidency covered the populous North Western Provinces also. The Court of the Sadar Diwani Adalat was situated at Calcutta. The inhabitants of Agra, before they could reach the Court in which they might obtain redress for the partiality, ignorance or injustice of the local tribunals, had over a thousand miles to traverse, and a climate to encounter very much different from their own. The distance from the presidency of the districts comprised in the Western Provinces, and the difference of their climate from that of Bengal, were so great as to deter individuals from personally resorting to the highest appellate authority, to obtain redress against any acts or orders of the subordinate Courts. The suitors in these provinces were thereby subjected to serious expense, difficulties and delays in prosecuting or defending appeals at the Adalat. Such a state of affairs did not only produce disgust with the legal institutions among the inhabitants of the North Western Provinces, but it was tantamount to an absolute denial of justice. It was very necessary, therefore, to establish a separate Sadar Diwani Adalat and a Nizamat Adalat for the Western Provinces. Such a step was calculated to obviate

the manifold difficulties to which the suitors were subjected, and also to establish a more proximate control over the civil and criminal judicature in those provinces which had hitherto been without any sort of an effective supervision and control whatsoever.

Taking all these factors and circumstances into consideration, the Government of Lord William Bentinck established the Court of Sadar Diwani Adalat and Sadar Nizamat Adalat at Allahabad from the 1st of January 1832. Regulation VI of 1831 achieved this object. This Court was to exercise jurisdiction over the province of Banaras, the ceded and conquered provinces including the districts of Meerut, Saharanpore, Muzaffarnagar and Bulandshahar. In this way, adequate facilities of appeal were afforded to the inhabitants of the North Western Provinces.

RE-ORGANISATION OF CRIMINAL JUDICATURE

The Cornwallis' scheme of criminal judicature had failed to promote expeditious trials of criminal offences.[1] The experience of forty years had revealed many imperfections in that system. Some changes had of course been made in that system from time to time, on the spur of necessity, but they did not sufficiently relieve the situation. Bentinck realised that the institutions of 1790 and 1793 needed radical repairs and that only slight adjustments here and there would not do. And so, he started on the work of re-organising and reconstructing the whole fabric of the criminal judicature.

By the time of his arrival in India, the Provincial Courts of Appeal and Circuit had subsisted for nearly 40 years. They had come to constitute a very cumbrous machine for the administration of civil and criminal justice. They failed to achieve the two great objects of a court—the cheap and early decisions of suits. They were in fact, as Lord William aptly described them, 'the resting place for those members of the service who were deemed unfit for higher responsibilities.'

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1. See page 247.

With reference to criminal justice, these Courts were felt to be a heavy incubus on the judicial institutions. They proceeded once in every six months, to hold the sessions and gaol delivery in each district. The prosecutors and witnesses were detained for many months awaiting their arrival. People felt it to be an intolerable grievance to be separated for a long period from their families and means of subsistence. The prisoner was equally consigned to a very prolonged imprisonment before he was tried. To those who happened to be guilty merely of minor offences, or those who were proved to be innocent, this long confinement without trial was a glaring injustice.

Lord Bentinck determined to break up this venerable but useless system. Regulation I of 1829 effected the change. The preamble of this all important Regulation mentioned the following reasons in justification of the proposed reforms :

1. The system in operation for superintending the magistracy and the police, and for controlling and directing the executive revenue officers, who in several cases were also magistrates[1], had been found to be defective.

2. The Provincial Courts of Appeal and Circuit, partly from the extent of country placed under the authority of each and partly from their having to discharge the duties of both civil and criminal tribunals, had, in many cases, failed to afford that prompt administration of justice which it was the duty of the government to secure for the people. The gaol deliveries had been, in some instances, delayed beyond the term prescribed by law.

3. A great arrear of cases under appeal had accrued in all the Courts, to the manifest injury of many individuals, and to the encouragement of litigation and crime.

4. The Judges of Circuit did not have opportunity of acquiring sufficient local knowledge to enable them adequately to control the police, or protect the people.

1. See page 256.

To rectify these various defects, the Governor General in Council thought it necessary and expedient 'to place the magistracy and police, the collectors and other executive revenue officers, under the superintendence and control of Commissioners of Revenue and Circuit, each vested with the charge of such a moderate tract of country as may enable them to be easy of access to the people, and frequently to visit the different parts of their respective jurisdictions ; to confide to the said Commissioners the powers now vested in the Courts of Circuit, together with those that belong to the Board of Revenue....'

The whole area under the Bengal Presidency, which extended as far as Saharanpore and Meerut, was arranged into twenty divisions. In each of these divisions, a Commissioner of Revenue and Circuit was appointed. To these Commissioners was entrusted the responsibility of conducting *sessions*. For this purpose, these Commissioners were to possess and exercise, each in his division, all the powers and authority which hitherto were exercised by the Judges of Circuit. The gaol deliveries were ordinarily to be held at the station of the Magistrate or Joint Magistrate making the commitments. The gaol deliveries were to be held at such periods as might, from time to time, be fixed under the orders of the Government ; but there were to be at least *two gaol deliveries in each year for each district*. In practice, the Government directed the Commissioners to hold gaol deliveries every quarter.

With the new arrangements coming into force, the powers and authority then belonging to the Judges of the Provincial Courts of Appeal for the divisions of Calcutta, Dacca, Murshidabad, Patna, Banaras and Bareilly, in their capacity of judges of circuit, were to cease.

The Commissioners of Revenue and Circuit were also entrusted with some *revenue duties* mainly of a supervisory character over the Collectors. They were also charged with the duties of *superintendents of police* for their respective divisions.

The Commissioners were to be subject to the authority

and control of the Nizamat Adalat in their judicial functions, and to the Sadar Board of Revenue in their revenue duties.

By Regulation II of 1829, all orders passed by the Magistrates were made appealable to the Commissioners of Circuit. Regulation VI of 1829 extended the powers of the Magistrates. They were authorised to pass sentences of imprisonment extending up to two years with labour.

The previous system, existing prior to 1829, under which there used to be only two sessions in a year, was injurious to the cause of justice, unjust to all those who were involved in criminal cases, and injurious to the interests of society. The effective remedy would have been to have appointed a sufficient number of distinct officers for the work of conducting the sessions in areas of manageable size. But this, it was said, was impossible in the financial circumstances of the country. The plan adopted, therefore, was to unite the three functions of commissioner of revenue, judge of circuit, and superintendent of police. All these functions were to be exercised by the same individual, whose jurisdiction was to extend over not more than two, three or four districts according to their size. From a practical point of view, the new arrangement was decidedly an improvement on the old system in certain respects. The sessions began to be held with greater frequency. The accused persons did not have to remain in jail for long without trial. Appeals from the decisions of the Magistrates could be made with less trouble and expense to the parties and were decided much more speedily.

But the new system suffered from certain drawbacks also. The judicial functions were found to be *incompatible* with fiscal duties. The arrangement of making a tax gatherer a judge also was absurd and impolitic. Some Commissioners paid more attention to the revenue work and neglected the judicial duties ; while some neglected the revenue work. The charge of revenue as well as of sessions was too heavy for one single individual. Consequently, efficiency suffered a great deal.

To remove these defects and with a view to enable the several Commissioners of Revenue and Circuit to devote a sufficient portion of their time to the discharge of the duties of the former office, as well as to provide for the more speedy trial of criminal offences, another significant change was effected in the country's criminal judicature in 1831 by Regulation VII, enacted during the incumbency of Lord William Bentinck.

The Governor General in Council was thereby empowered to invest, by an Order in Council, the Judges of zillas or cities with full powers to conduct the duties of the sessions. The Sessions Judges so appointed were to try every commitment that might be made by the Magistrates of their respective jurisdictions, 'as soon after it is made as may be convenient, and gaol deliveries for each district shall be held at least once in every month.'

The new Regulation did not divest the Commissioners, as a whole, of their powers to conduct the sessions. The Regulation was merely of a transitory nature. To start with, the transfer of sessions duties from the Commissioner to the Diwani Judge was intended to be made only in those exceptional cases where the pressure of work devolving upon a Commissioner rendered such a course advisable. But soon the exception became the rule; the Commissioners were very generally unable to manage the sessions work in addition to their other duties; and so, invariably *the sessions work in the districts came to be transferred to the Diwani Judges.* Thus were born the courts, the District and Sessions Courts, which subsist and function even at present, and have judicial functions in both the spheres of justice—civil as well as criminal.

The permissive legislation[1] of Lord Hastings by which the Collectors might be authorised to exercise magisterial powers was widely used during the days of Bentinck. Practically throughout the mofussil, the Collectors came to exercise the magisterial powers. This arrangement was open to criticism. The Collector was thereby constituted a Judge of his

1. See page 256.

own actions. He was relieved of control and responsibility. There could be little protection to the people against extortions in realizing the government revenue, if the same person, as Magistrate would decide a complaint against his own acts, as Collector. The arrangement of combining the functions of Collector and Magistrate was more open to censure than that of combining the functions of Civil Judge and Magistrate; for it not only weakened the magisterial usefulness, but imparted an odium to his office of the Collector. The functions of a thief catcher and that of a tax collector did not go hand in hand. But the system continued.

The union of the offices of Collector and Magistrate, which was effected in 1831, lasted for a few years when again a change was thought to be necessary as it was felt that the magisterial duties were very much neglected under that set-up. In 1837, the Governor General, Lord Auckland, procured the sanction of the Court of Directors to the separation of the two offices, which was gradually effected in the course of the following eight years. In consequence of the small salaries allowed to the Magistrates, the office fell in to the hands of junior and more inexperienced members of the service, and the effect on the administration of justice was not very happy. After careful consideration and much discussion, the offices of the Collector and Magistrate of the district *were again united* in 1859.

In 1864, the High Court of Calcutta complained that the Chief Magistrates of the districts did very little criminal work, the effect of which, upon the administration of criminal justice, was very injurious. The Magistrates were called upon for explanations. It was found that the union of the two offices placed a heavy burden on the officer who could not discharge it satisfactorily except by an unusual effort on his part. Several officers proposed separation of criminal and judicial work from the revenue and general administration and the appointment of an officer at the head of each. Sir James Fitzjames Stephen, the then Law Member, however, did not approve of this proposal. In his minute on the administration

of justice in 1872, he adduced *inter alia* the followirg reasons for his disapproving of the proposed reform :

1. The first principle was that the maintenance of the position of the district officers was absolutely essential to the maintenance of the British Rule in India, and that any diminution in their influence and authority over the natives would be dearly purchased even by an improvement in the administration of justice.

2. The exercise of criminal jurisdiction was, both in theory and in fact, the most distinctive and most easily and generally recognised mark of sovereign power. All the world over the man who could punish was the ruler. Put this prerogative exclusively in the hands of a purely judicial officer who had no other relations at all to the people and who passed his whole life in a Court ; the result of this would be to break down in their minds the very notion of any sort of personal rule or authority on the part of the Magistrates.

And Stephens concluded : 'I do not think that, situated as we are, the law can ever be carried out effectually except in one of the two ways, namely, either by the strong personal influence of Magistrates known to and mixing with the people, or by an enormously increased military force. In a few words, the administration of criminal justice is the indispensable conpition of all government, and the means by which it is in the last resort carried on. But the district officers are the local governors of the country ; therefore the district officers ought to administer criminal justice....Therefore, it is necessary, upon the whole, that the district officers should both administer criminal justice and discharge miscellaneous executive functions.'

In this way, the system of Collector-Magistrate was perpetuated in the country. The jurisdiction, powers and functions of the Magistrates came to be regulated by the Criminal Procedure Code of 1872. The system of Collector-Magistrate continues to work even to-day.

It may, however, be noted that the arguments of Stephens do not have any validity in the modern context of India. What is needed to-day is efficiency in the administration of justice so that liberty, property and person of individuals may be adequately protected. And, therefore, sooner the system is changed by effecting separation in the judicial and the executive functions, the better it will be in the interests of law and justice.

REFORMS IN CIVIL JUDICATURE

Lord Bentinck's reforms in the sphere of civil judicature were more conspicuous and salutary than his reforms on the criminal side.

Lord Cornwallis had consistently employed himself in excluding the natives from all offices of any importance and distinction in the Government. The leading feature of his administration was its total dependence on European agency and the absence of Indians from every situation of trust, responsibility and emoluments. He narrowed the circle of employment for the natives to the smallest possible limits. In the department of civil justice, the jurisdiction of the Native Commissioners—who were denominated as Munsiffs also—was restricted to suits up to fifty rupees only. These officers were honorary, and they were instituted to give relief to the Diwani Judges.[1]

Indians thus came to enjoy a very subordinate and inferior status in their own country.

The results of this narrow policy were most unfortunate. The English functionaries did not understand the language, manners and habits of the natives. The inevitable result of this circumstance was to make the administration unpopular and inefficient. Cases piled up in the Courts. The proceedings of the Judges were dilatory and costly. There were not enough Judges to cope with the vast amount of litigation arising in the country. The multiplication of English

1. See page 178.

administrators was no remedy. Its cost was prohibitive. The only remedy was the association of Indians in large numbers. The policy of excluding the natives from all share in the administration was highly unjust, unrealistic and impolitic. It had a demoralizing effect on the natives. It killed their self-respect and self confidence.

However, it took long to reverse this doctrine of exclusiveness. The folly of the system gradually became apparent in the increasing defects of the English administration. The districts entrusted to the English servants were too large for their supervision. Their knowledge of the native customs and habits was limited. They could not, therefore, act with vigour and efficiency. The amount of labour and responsibility thrown upon them rendered it impossible for them to perform their duties with satisfaction. By slow degrees did the most discerning of the English servants become aware of the fatal error which had been committed in the attempt of governing millions of people with a bare one thousand foreigners.

On the other hand, the functions which were entrusted to the natives, limited though they were, were discharged by them with efficiency and responsibility. Working as Munsiffs, they already disposed of 9/10 of the civil judicial work in the country. It was absolutely impossible to provide for the trial and decision of the numerous cases occurring in the extensive and populous provinces without the aid of some sort of inferior judicatures under native superintendence. In 1801, suits disposed of by the Munsiffs were: suits decreed, 1,83,422; suits adjusted by the parties before them, 1,84,811. The process in the Munsiff's Court was very inexpensive as compared to the Diwani Adalat. Munsiff's proceedings were quite expeditious. He knew the native language, habits, manners and customs. He had, therefore, many advantages on his side. Perjury was very uncommon in his Court. A Munsiff could sit the whole day in his Court, without being incommoded by heat or crowds and worked patiently to discharge his duties. The Judge of Midnapore praised the work of the Munsiffs. 'They sit from

morning till night on a mat, under a shed or hut, or in the porch of a house, and attend to every petty dispute of a ryot with a degree of patience, of which we have no idea, till they develop the merits, and decide the suit.'

The parties could not easily deceive a Munsiff. He could 'examine witnesses and investigate the most intricate case, with more temper and perseverance, with more ability and effect than almost any European.' Moreover, the establishment of natives was much *cheaper* than the English one. In course of time, the incompetency of the natives for the performance of the official duties—the assumed fact on which Cornwallis' system of exclusion rested—was found out to be a mere assumption, a myth, a fiction, which was unable to stand the test of experience. The natives performed their duties with zeal and ability. Their admission to higher offices was very strongly recommended by some far-sighted servants of the Company.

From 1793 to 1831, however, there was a steady, though slow, progress in the movement of employing the natives more and more extensively in the sphere of administration of justice. *They came to have somewhat wider judicial powers during these forty years. But enough had not been done till Bentinck came on the scene.*

The necessity of introducing the natives to offices of higher responsibility, and of giving them a corresponding increase of allowances, was early perceived by the Court of Directors. In 1786, they had already pointed out to the Bengal Government that it might not be practicable in many cases, and, in general, by no means eligible in point of policy to increase the number of Englishmen in the interior of the country. Neither was it necessary for good government nor was it productive of any benefit to the Company in proportion to the vast expense attending it. They did take a right view when they observed, 'When the talents of the more respectable natives can with propriety and safety be employed in the management of the country, we think it both *just and politic* to carry that principle in to effect....'

Cornwallis did not give any heed to that advice. In 1813, though Lord Hastings increased the scope of their employment yet the Directors were not satisfied with what had been done. They enunciated two important principles in this respect in 1824. Firstly, they proposed that to secure a prompt administration of justice 'native functionary must be *multiplied* so that they might be able to dispose of all civil suits in the first instance without regard to the amount at stake. Secondly, they proposed that 'when we place the Natives of India in situations of trust and confidence', it was expedient under every consideration of justice and policy 'to grant them adequate allowances.' On this point the Directors observed: 'We have no right to calculate on their resisting temptations to which the generality of mankind in the same circumstances would yield.'

In enunciating their policy regarding the place of Indians in the administration, the Court of Directors manifested a degree of liberality which their servants in India were not prepared to second. The authorities in India after 1793, it is true, finding the old principle of exclusiveness utterly impracticable, had been constrained by the irresistible force of circumstances, gradually to enlarge the powers and jurisdiction of the Native Judges. Without such assistance the business of the Courts was in the danger of being brought to a dead stop. But still, the pay, allowances and authorities of the Indian Judicial Officers continued to be very inadequate. This aspect of the problem was touched upon forcibly by the Court of Directors in 1828: 'It is nevertheless essential to this result in India, that the Natives employed by our government shall be liberally treated, that their emoluments shall not be limited to a bare subsistence, whilst those allotted to Europeans in situations of not greater trust and importance enable them to live in affluence and acquire wealth. Whilst one class is considered as open to temptation and placed above it, the other, without corresponding inducement to integrity, should not be exposed to equal temptation, and be reproached for yielding to it.'

Lord William Bentinck assumed the reins of government in July, 1828. He soon came to the conclusion that the policy of excluding the natives from all share of administration 'was absurd and impolitic, that it was impossible to continue the English Government on the principles of perpetually excluding the natives from all participation in its honours and responsibilities and that the prevalent system was in need of a complete and radical change. William Bentinck spent three years in maturing his plans ; thereafter, he wrote to the Directors :

'A more extended recourse to Native agency for the disposal of judicial business has been so earnestly, repeatedly, and so recently urged by your Honourable Court, that I should almost have deemed it my duty to give effect to your injunction, inspite of any local obstacles which have opposed themselves. But concurring as I do most cordially, in the wisdom, the justice and the sound policy of these injunctions, and being fully satisfied that Native probity and talent may immediately be found, if due caution be observed in the selection of instruments, in sufficient abundance to justify the present introduction of the system, I should have deemed myself criminal had I any longer delayed to concede to the people of this country a measure so solemnly calculated to facilitate their access to justice; to conciliate their attachment, and to raise the standard of the moral character.'

Bentinck thus resolved to provide for the larger introduction of the natives into every department of public business. He created new offices of trust and emolument for them, introducing them to a large extent in to the judicial and fiscal administration of the country. He reorganised the judicial system of the country in the sphere of civil justice. The basic feature of the new system was the throwing open of gates of responsible and respectable judicial appointments to the natives. There is not the least doubt in affirming that the business of the country came to be much better executed after this association of the natives with the administration. It was done with greater expedition and satisfaction at

comparatively smaller cost. It was a tribute to his liberal policy that in 1833, the Charter Act in its 87th clause enacted :

'No Native..nor any natural born subject of His Majesty resident therein, shall by reason only of his religion, place of birth, descent, colour, or any of them, be disabled to hold any place, office, or employment, under the said Company.'

BENTINCK'S SCHEME OF 1831

The new scheme for the dispensation of justice in the country was embodied in Regulation V of 1831. The preamble narrated the following reasons for the enactment of the particular Regulation :

1. The state of civil business in the Zilla and City Courts rendered it desirable on general grounds to employ respectable natives in more important trusts connected with the administration of the country.

2. It was expedient that the provisions for this purpose should be gradually introduced into the zillahs and cities from time to time as the Governor General in Council, by an Order in Council, might be pleased to direct.

3. It had become necessary in connection with those arrangements, to modify the powers and duties of the Zilla, City and Provincial Courts.

4. It had been deemed just and proper that no native of India should be considered ineligible to the office of the Munsiff or vakeel on account of his religious belief or persuasion.

To achieve these objects, the Regulation made, *inter alia*, the following provisions :

(i) Munsiffs were empowered 'to receive, try and determine' all suits not exceeding in value or amount the sum of *three hundred rupees*.

(ii) The office of the Munsiff was open to the natives of India, of any class or religious persuasion.

(iii) All suits within the competency of a Munsiff to

decide were ordinarily to be instituted in the Munsiff's Court. Nevertheless, the Zilla or City Diwani Judge was to be competent to receive such suits, try them himself, or to refer them for trial to any other Court subordinate to this authority, 'whenever he may see sufficient reason for so doing.'

(iv) Hitherto, the Munsiff used to receive, as a compensation for his trouble in the trial of suits, the amount of the institution fee. These provisions were rescinded, it being laid down that henceforth the Munsiff should receive from the Government such monthly allowances 'as may be fixed by the order of the Governor General in Council.'

(v) The second category of native officers introduced for the administration of civil justice was that of Sadar Ameens. The Office was open to natives of India of any class or religious persuasion. Their number in a district was to be regulated in such manner as the Governor General in Council might be pleased to direct.

(vi) The Zillah and City Judges were to be competent to refer to any of the Sadar Ameens, subject to their authority, for trial and decision, any original suits pending or instituted in their Courts, if the amount or value of the subject matter involved therein was 1000 rupees or less.

(vii) Hitherto, these were the only two categories of Native Judges who used to decide civil suits. By Regulation V another higher class of Native Judges also came to be appointed. They were to be known as the Principal Sadar Ameens. It was to be open to the Governor General in Council to appoint to any zillah or city jurisdiction, one or more Principal Sadar Ameens. The office of the Principal Sadar Ameen was to be open to Natives of India of any class or religious persuasion. They were to receive

such monthly allowances as might be fixed by the Governor General in Council.

(viii) The Zillah and City Diwani Judges were authorised to refer to the Principal Sadar Ameens any original suits in which the amount of the subject matter did not exceed *five thousand rupees.*

(ix) In appeals from the decisions of the Munsiff or the Sadar Ameen, the decisions of the Zilla or City Diwani Judge were to be final.

(x) In all cases originally decided by the Principal Sadar Ameen, an appeal was to lie to the Diwani Judge. A further or special appeal might lie to the Sadar Diwani Adalat.

(xi) In all suits originally decided by the Zilla or City Diwani Judge, an appeal was to lie to the Sadar Diwani Adalat.

(xii) Following categories of persons were exempted from the jurisdiction of the Native Judges of all categories :

(a) An European British Subject ;
(b) An European Foreigner ;
(c) An American.

(xiii) All those provisions of the previous Regulations which authorised reference of civil suits for trial to the Registrars attached to the several Zilla or City Courts of Diwani Adalat, were rescinded. Such cases, henceforth, were to be referred to the Sadar Ameen or the Principal Sadar Ameen according as might be the value of the subject matter.

PROVINCIAL COURTS OF APPEAL ABOLISHED

In the days of Cornwallis and immediately thereafter, the Provincial Courts of Appeal were quite respectable judicial institutions. Some of the ablest men in the Company's service were appointed to them to raise their dignity. But in course of time, these courts sank into inefficiency. Their judicial

reputation was extremely low. They served no useful purpose except that of delaying the judicial proceedings. Their decisions furnished no clear precedent for the guidance of the lower Courts. They had sunk into something very different from what Cornwallis had wished them to be. The reason for this development was this: The revenue branch of service had been gradually treading down the judicial. The best men in the service were attracted to the Revenue Administration leaving behind only the inefficient for presiding over the Provincial Courts. These Courts, which were once the objects of ambition to the ablest and the best men among the Company's servants, had become little better than refuge for the destitute and incapable among them. 'They required picked men to render them efficient, and they had been presided over by the refuse.'

Bentinck now made up his mind to abolish them. In 1829, the Provincial Courts of Appeal and Circuit were deprived of their criminal functions as Courts of Circuit. Regulation V of 1831, which introduced Bentinck's new scheme of civil judicature, transferred practically all their functions to the Zilla and City Diwani Judges. The Regulation laid down that into whatever zilla or city the Governor General in Council extended its provisions the Provincial Court of Appeal should cease to exercise jurisdiction there.

The new scheme was to be introduced in the country gradually, district by district, it being necessary to do some preliminary work before the introduction of the new plan. In 1833, a Regulation was enacted to empower the Governor General in Council *to abolish* the Provincial Courts of Appeal. Section IV of Regulation II laid down that whenever the provisions of the scheme of 1831 had been introduced in all the districts constituting the jurisdiction of a Provincial Court, the Governor General in Council should be competent to abolish the Provincial Court by an order. In course of time, all the Provincial Courts were abolished.

NEW SCHEME—AN APPRAISAL

The new judicial scheme of Bentinck resulted in simplifying, expediting and cheapening the administration of civil justice. It was based on very sound principles. The introduction of the Native Judges infused greater energy, efficiency and expedition in the distribution of civil justice in the country.

In the scheme of Cornwallis, the Diwani Adalat was the principal court of original jurisdiction within its local jurisdiction. It was its duty to decide, in the first instance, all civil suits, except those which fell within the jurisdiction of the Munsiffs and Registrars. It, therefore, *discharged the bulk of original work.* Under Bentinck's plan, the Diwani Adalat, presided over by an English covenanted civil servant of the Company, had original jurisdiction in all cases though it was expected to decide cases in the first instance only when the subject matter involved amounted to over Rs. 5000. All the cases below that monetary ceiling were ordinarily to be decided by the Native Judges subject to the control of the Diwani Court. The Diwani Adalat heard appeals from the lower Courts. Its main function thus became appellate. It exercised original jurisdiction only in exceptional or special cases.

Bentinck's judicial plan in short, was as follows :

1. Munsiffs : At the lowest rung of the judicial hierarchy came the Munsiffs. They were Indian Officers, being entrusted with the responsibility to hear and determine civil suits not exceeding Rs. 300.

2. Sadar Ameens : They were Indian Judges. They used to decide cases up to Rs. 1000, on a reference being made to them by the Diwani Adalats.

3. Principal Sadar Ameens : They were Indian Judges entitled to decide cases up to Rs. 5000, on a reference by the Diwani Adalat.

4. Zilla and City Adalats or Courts of Civil Justice : These

Courts were presided over by English Judges. It would decide civil causes over Rs. 5000 in value. It heard appeals from all the Courts numbering 1, 2, 3 above.

5. Sadar Diwani Adalat : Being the ultimate Court of Appeal in civil cases it was presided over by English Judges. It heard appeals in cases decided originally by the Diwani Adalats.

It may be pointed out that the Zilla and City Courts, besides their functions in the sphere of civil justice, discharged criminal functions also as Courts of Sessions, trying persons committed for trial by the Magistrates. This Court exercising dual jurisdiction is present even to day under the title of the District and Sessions Court.

Under the Bentinck's system each district was divided into a certain number of munsiffships. The Munsiff's station was generally placed in the centre of a circle so as to meet the convenience of the people, and to bring justice as much as possible to every man's door. The Munsiff was the poor man's judge ; redress in ninety nine cases of civil justice out of a hundred, was given exclusively through him. The other Judges, Sadar Ameens, Principal Sadar Ameens held their Courts at the same station as the Diwani Adalat of the Zilla or City. The local jurisdiction of these Native Judges was commensurate in extent with that of the Adalat to which they were subordinate. The Adalat had concurrent primary jurisdiction in all suits of whatever value, yet suits were not usually brought before it in the first instance, except under peculiar circumstances or when the cause of action was valued over Rs. 5000. The Judge of the Adalat was the highest judicial functionary in each zilla.

JURY SYSTEM

Regulation VI of 1832 enabled European functionaries to avail themselves of the assistance of respectable natives in the administration of civil justice. It was considered desirable 'to

enable the European Functionaries who preside in the courts for the administration of civil....justice to avail themselves of the assistance of respectable Natives in the decision of suits, or the conduct of trials, which may come before them'. To achieve these objects, the Regulation made provisions for enabling a European Judge of a Civil Court, in the trial of civil suits original or appeal, to avail itself of the assistance of respectable natives in either of the three following ways :

(i) By referring the suit, or any point in the case, to a panchayat of such persons 'who will carry on their inquiries apart from the court, and report to it the result.'

(ii) By constituting two or more such persons assessors or members of the court, 'with a view to the advantages derivable from their observations particularly in the examination of witnesses'. The opinion of each assessor was to be given separately and discussed.

(iii) By employing them more nearly as a jury ; they were to attend during the trial of the suit, and were to suggest, 'as it proceeds, such points of inquiry as occur to them ; the court, if no objection exists, using every endeavour to procure the required information, and after consultation will deliver in their verdict.'

The mode of selecting the jurors, the number to be employed, and the manner in which their verdict was to be delivered were left to the discretion of the presiding judge.

It was to be understood clearly that, under all the modes of procedure described above, decision was vested exclusively in the authority presiding in the Court.

LATER CHANGES

Under the Regulation of 1831, the Principal Sadar Ameens could try suits valuing up to Rs. 5000, over which limit the suits were tried by the City or Zilla Adalats. In 1837, a proposal was made in the Legislative Council of India to drop the

monetary restriction on the jurisdiction of the Principal Sadar Ameen so as to enable him to decide suits of any amount. There were some who doubted the wisdom of the measure. The Judges of the Sadar Diwani Adalat wrote to the Government that they would not advise the passing of an Act authorising this change as the official integrity of the Indian Judges was not very high. Some of the members of the Governor General's Council did not agree with the view of the Judges of the Sadar Court, and they supported the change. For the last five years these Indian Judges had been entrusted with suits involving Rs. 5000 or less. Their work had not been found to be unsatisfactory, only a very few cases of corrupt conduct having been brought to light. Shakespeare, a member of the Council, was in favour of effecting the change as he did not 'entertain an unfavourable opinion of native character.' Macaulay, the Law Member supported the proposal very strongly. In his opinion, causes of more than five thousand rupees were not likely to be more intricate than causes of less value. There was no question either of law or fact which could not be raised in the course of a suit for a lakh of rupees and which was not equally likely to be raised in the course of a suit for a thousand rupees. If the Judges could decide causes up to five thousand rupees they could very well decide causes beyond that amount also. Some relief could be provided to the overworked Adalat of the Zilla by extending the original jurisdiction of the native functionaries. They already decided a large number of suits and so the objection of the Sadar Court did not have any validity. As Macaulay observed : 'The argument of the Sadar Court when reduced to plain language is this : The native Judges are bad and corrupt. Therefore leave to them more than nine hundred ninety nine cases in a thousand. Leave to them all the cases of the poor and almost all the cases in which the middle classes are concerned. Leave to them a power which enables them to reduce unjustly to hopeless poverty every inhabitant of the Empire, except perhaps a twenty-thousandth part of the population.' Put in this form, the argument of the Sadar Court reduced itself to an absurdity !

With such a strong advocacy, the Act could not fail to pass ; and late in 1837 it was duly enacted. Act XXV of 1837 authorized the Principal Sadar Ameens to take cognizance of suits involving any amount referred to them by the Zilla or City Diwani Adalat. In suits exceeding Rs. 5000, an appeal lay direct from them to the Sadar Diwani Adalat. In suits below Rs. 5000 appeals were to lie, as usual, to the Diwani Adalat. The ordinary jurisdiction of the Principal Sadar Ameen had no limit in amount or value. His office came to assume a very high importance. It was his Court in which cases involving enormous amounts of property were ordinarily disposed of in the first instance.

The Indian Judges received very low salaries. It was essential to increase their emoluments 'to secure efficiency combined with integrity.' Macaulay supported the proposal of making some addition to the salaries of the Principal Sadar Ameens and other native judicial officers. In consequence, the grades of the Indian Judges were revised and enhanced.

INDIANS IN CRIMINAL JUDICATURE

The first move to entrust the Indians with some responsibility in the sphere of criminal law and justice, was taken by Lord Hastings in 1821 when a Regulation permitted the Zilla and City Judge, acting as the Magistrate, to refer petty offences for trial, to the Hindu and Mohammedan Law Officers and to *Sadar Ameens*. The plan did not survive for long, for very soon after, the magisterial functions of the Judge came to be transferred to the Collector.

For some time the Indians had no part to play in the administration of Criminal Law and Justice. In 1843, however, the natives were entrusted with some magisterial functions. The exigencies of the public service required that the Police and criminal branch of the Judicial Department should be strengthened by the more extensive employment of uncovenanted agency of Native Officers. Accordingly, Act XV of 1843, passed during the administration of Lord Ellenborough, empowered

the Local Government of the Bengal Presidency to appoint in any zilla or district one or more uncovenanted Deputy Magistrates. These persons could also be employed in the Revenue Department. In practice the office of the Deputy Magistrate was combined with the office of the Deputy Collector.

DIWANI ADALATS AND REVENUE CAUSES

In his scheme of 1793, Cornwallis conferred jurisdiction to decide all revenue cases on the Diwani Adalats. The Collectors were to concern themselves with the task of collecting revenue. He was not to exercise any judicial functions in this sphere.

The arrangement was modified a little in 1794,[1] when in order to relieve congestion in the Diwani Adalats, the Government of Shore authorised the Adalats to refer to the Collectors the work of adjusting accounts in cases pending before them. The Collectors were to make a report to the Adalat for its taking whatever action it liked. With this starts the commencement of the process of a re-transfer to the Collectors of judicial functions. With the passage of time more and more judicial authority came to be vested in the Collector. Regulation VII of 1799 provided a summary procedure for the determination of claims to arrears of rent. The purpose of the Regulation was to establish a more certain and easy process for enabling landholders and farmers of land to realize their rents. The party from whom the arrears were due could be arrested by an order of the Judge on the petition of the landholder. The matter was then referred to the Collector for adjustment and report. In such cases the party aggrieved could institute a regular suit after summary investigation. The Court was then to make a regular judicial investigation.

Regulation V of 1812 laid down more specifically the rules under which a zemindar could distrain the property of his tenant with a view to recovery of rent. The Collector was to give a summary judgment in such cases. Any person who

1. See page 208.

was dissatisfied with the summary judgment of the Collector could bring a regular suit in the Diwani Adalat for a full and formal investigation of the merits of the case. The jurisdiction of the Adalat was not excluded from the sphere of revenue cases. A regular suit in the first instance or a summary suit before the Collector followed by a regular suit in the Adalat were the alternative remedies available.

Regulation VIII of 1831 was passed on account of the fact that it was necessary to provide more effectually for the adjustment of suits and claims relating to arrears or exactions of rent. Summary claims were henceforth to be filed with the Collectors whose decisions were to be final subject to a regular suit in the Court in such matters. In 1831 rent and revenue cases were thus again transferred to the Collectors, to be disposed of in a summary manner in order to facilitate the collection of government revenue. No rules, however, had ever been laid down for conducting the summary inquiry by the Collectors. Considerable oppression resulted from this state of things.

In 1859 matters were made worse because Act X, passed by the Governor General in Council made all kinds of revenue cases cognisable by the Collectors in place of the Diwani Adalats as heretofore. The jurisdiction of the Courts was completely barred in such cases. Appeals from the Collectors went to the Commissioner subject to the over-all control of the Board of Revenue.

There was a strong opposition from responsible quarters to the passage of these provisions which deprived the Civil Courts of their jurisdiction in so many important varieties of revenue cases which were transferred to the exclusive cognisance of the revenue officers. The effect of the Act was to bring cases involving intricate points of law, concerning important interests in land, under the adjudication of the Collectors who were hardly capable to discharge it with efficiency.

The policy of Act X of 1859 underwent a radical change

in 1869. Act III of that year enacted by the Bengal Legislative Council again transferred the jurisdiction to decide all revenue cases to the Civil Courts. The Act, however, gave way to the Bengal Tenancy Act passed by the Governor General in Council in 1885. The 13th Chapter of this Act authorises the Civil Courts to determine disputes between landlords and tenants. The Revenue Officers still have some jurisdiction to determine disputes between landlords and tenants arising in the course of preparation of records of rights.

The Civil Courts in Bengal thus have very wide jurisdiction in rent and revenue cases.

CHAPTER XIV

A

JUDICIAL SYSTEM BEYOND BENGAL

JUDICIAL SYSTEM IN MADRAS : 1802

By the end of 19th century, the Company was successful in annexing large tracts of territory around the presidency of Madras, which were placed under the control of the Government there. In course of time, there arose the need of creating a judicial system in these newly acquired territories which were inhabited by the natives. Accordingly, in the year 1802, during the governorship of Lord Clive, an Adalat System was created in the province of Madras on the pattern of the Bengal system of 1793.

The offices of Judge, Magistrate, and Collector of the revenue, were to be held by *distinct persons*. By Regulation II of 1802, a Court of Diwani Adalat or a Civil Court was introduced in each district for the purposes of trying civil and revenue causes. The Collectors and other executive officers of the Government were to be amenable to the jurisdiction of the Diwani Adalats for any act done in their official capacity in opposition to any Regulation. Each Civil Court was to be presided over by a Judge who was to be assisted by the Native Law officers. All decisions of the Zilla Court were final in suits under 1000 rupees in value; above that amount, an appeal lay to the Provincial Court of Appeal.

As in Bengal so in Madras, four Provincial Courts of Appeal were established to hear appeals from the Zilla Civil Courts. Their decisions were final if the amount in dispute did not exceed Rs. 5000. Above that amount a further appeal lay to the Sadar Diwani Adalat. (Regulation IV of 1802).

Regulation V created the Sadar Diwani Adalat which was to consist of the Governor and members of the Council as Judges. Its decisions were final except in civil suits of the value of Rs. 45000 or over in which an appeal could further be made

to the Governor General in Council at Calcutta. This was an important *innovation* in the case of Madras.

Regulation XVI authorised the appointment of Native Commissioners with power to try suits not exceeding 80 rupees in value; appeals from them lay to the Zilla Civil Judge.

Regulation XII authorised the Zilla Diwani Judges to refer to their Registers for trial and decision those causes where the property in dispute did not exceed 200 rupees. Their decisions were final up to the amount of 25 rupees, beyond which an appeal lay to the Zilla Judge.

The plan introduced in Madras for the administration of criminal justice was much the same as in Bengal. Magistrates were appointed to arrest persons charged with crimes or offences. They had the power to inflict punishment in cases of abuse, assault and petty theft by imprisonment, corporal punishment or fine up to Rs. 200. The British subjects residing in the provinces and charged of commiting criminal offences, were to be apprehended by the Magistrates, and sent for trial to the Supreme Court at Madras. This provision resembled the one made in Bengal by Cornwallis in 1793.

Four Courts of Circuit were constituted for the trial of persons charged with crimes or misdemeanours. The Judges were to hold half yearly gaol deliveries. The Judges of the Provincial Courts of Appeal were to be the Judges of the Court of Circuit in their respective divisions. The Courts of Circuit were entitled to pass every sentence but capital sentences passed by them had to be confirmed by the Fozdary Adalat at Madras.

For purposes of preserving uniformity in decisions throughout the several Courts of Circuit, and for the better regulation of all that related to criminal cases and the police of the country, Regulation VIII provided for the erection of the Fozdary Adalat or the Chief Criminal Court, to be held at Fort St. George and consisting of the Governor and members of the Council. The Court was empowered and directed to

take cognisance of all matters relating to the administration of justice in criminal cases and the police of the country. It had the power of *passing final sentences* in capital cases.

The sentences of the Criminal Courts were to be in accordance with Mohammedan Law as modified by the Regulations. The Civil Courts were to apply Hindu Law or Mohammedan Law, according to the religious persuasion of the parties before them. In other cases, they were to act according to justice, equity and good conscience.

CHANGES AFTER 1802

The Sadar Diwani Adalat and the Fozdary Adalat consisted of the Governor and members of the Council, assisted by the Head Kazi and two Muftis. In course of time, the territory under the Madras Presidency extended, which naturally occasioned a considerable increase in the business coming before these two Courts. Further, it was necessary to the impartial, prompt, and efficient administration of justice that the exercise of judicial functions be separated from the legislative and executive authorities, and that *distinct Judges* be appointed so that they might devote their whole time and attention exclusively to the punctual discharge of the judicial work. Regulation IV of 1806, therefore, appointed two puisne Judges who were not to be the members of the Government. The Governor was to act as the Chief Judge.

Under Regulation III of 1807, the Governor ceased to sit as the Chief Judge. The office henceforth was to be filled by some other member of the Council. The number of the puisne Judges was increased to three who were to be selected from among the covenanted servants of the Company. Regulation III of 1825 dropped the restriction as to the number of puisne Judges, the Governor in Council being empowered to appoint as many Judges as he thought fit in order to prevent any delay or failure of justice.

The number of causes pending before the Judges of the zilla being considerable, great delay began to occur in their

investigation and decision. Regulation VII of 1809, consequently, made some changes in the civil judicature. Provision was made for the appointment of Assistant Judges. More important was the provision which authorised the appointment of the Head Native Commissioners for the trial of causes up to 100 rupees referred to them by the Zilla Judges.

With a view of expediting the trial and decision of civil suits, it was deemed expedient to extend the jurisdiction of the Munsiffs or Native Commissioners. Accordingly in 1816, Regulation VI extended their jurisdiction up to Rs. 200. Regulation VIII of the same year extended the jurisdiction of the Sadar Ameens. The Zilla Judges were empowered to refer to them suits to the amount of Rs. 300, an appeal from their decisions lying to the Zilla Judges.

The year 1816 witnessed the creation of two interesting institutions. Regulation IV of that year made provisions for the appointment of Village Munsiffs, having authority to decide suits of money or personal property, the amount of which did not exceed ten rupees. Their decisions were final. They could decide cases up to a value of hundred rupees, if both parties to the suit agreed.

Regulation V of 1816 made provisions for the use of Village Panchayats in disposing of suits of a civil nature. If the two parties to a dispute agreed, the Village Munsiff could summon a Village Panchayat which was to consist of an odd number of persons, not less than five and not more than eleven, being the most respectable inhabitants of the village. There was no pecuniary limit as to the suits which could be disposed of by the Village Panchayats.

In 1818, the Governor General in Council *relinquished* the authority, hitherto exercised, of hearing appeals from the Madras Sadar Diwani Adalat, and henceforth these appeals began to go to the King in Council. Regulation VIII of that year prescribed the rules in that behalf.

Regulation III of 1833 extended the jurisdiction of Registers, Munsiffs and Sadar Ameens to 3000 rupees, 1000 rupees

and 2500 rupees respectively. In 1827, Regulation VII constituted the office of the Principal Sadar Ameens who were, at that time, known as the Native Judges and were authorised to decide causes up to Rs. 5000. It was in 1836, after the passage of Act XXIV of the Legislative Council of India, that they came to be known as the Principal Sadar Ameens.

A major reorganisation of the civil judicature in the province of Madras took place in pursuance of Act VII of 1843 passed by the Indian Legislative Council. The conspicuous feature of this measure was the abolition of the Provincial Courts of Appeal. The whole system of civil judicature was, however, reconstituted in 1873 which is still the basis of the modern judicial machinery in the State.

CHANGES IN CRIMINAL JUDICATURE AFTER 1802

Common with the Sadar Diwani Adalat, the constitution of the Fozdary Adalat also underwent a change in 1807, when the Governor ceased to sit as the Chief Judge. This office was to be filled by some other member of the Council.

An important change took place in the year 1816 when the office of the Magistrate was transferred from the Judge to the Collector. In course of time the powers of the Magistrates were increased.

Regulation X of 1816 appointed the Judges of the Zilla Courts as the Criminal Judges of their respective zillas with powers to punish some minor offences. Prisoners charged with more serious offences continued to be tried by the Courts of Circuit. The powers of the Criminal Judges, however, were increased from time to time. Ultimately, in 1843, the Courts of Circuit were abolished and their functions were transferred to the Criminal Judges, i.e. the Judges of the Diwani Adalats of the zillas, who, in this capacity, were to be known as Sessions Judges.[1]

To strengthen the magisterial establishments in the

1. Act VII of 1843.

mofussil, the Native Judges, who, subsequently, came to be known as the Principal Sadar Ameens, were appointed as Native Criminal Judges having the same powers as the Magistrates.

The criminal judicature of the Province of Madras thus came to be composed of:

1. Magistrates: They enjoyed the powers to apprehend criminals and award sentences in petty cases. Those guilty of serious offences had to be sent to the Criminal Court for trial.

2. The Subordinate Criminal Judges who acted as Principal Sadar Ameens also. They were empowered to try criminal cases which were not of so heinous a nature as to be sent to the Sessions Judge.

3. The Sessions Judges: They were the Judges of the Diwani Adalats and tried serious criminal cases.

4. The Sadar Fozdary Adalat: It was the Chief Criminal Court and had cognisance of all matters relating to criminal justice and the police. It alone could pass the final sentence of death. It could annul, revise or mitigate the sentences of the lower Courts. It could call for the record of a trial in any Criminal Court.

ADALATS IN THE PROVINCE OF BOMBAY

The process of establishing a judicial system in the territories subject to the Government of Bombay was initiated with the creation of Adalats in the islands of Salsette and Caranja and its dependencies of Hog and Elephanta in the year 1799 during the Government of Mr. Duncan. In course of time, new tracts of territory fell under the Bombay Government. The judicial system was extended to these territories also.

The early system resembled the Cornwallis System of Bengal in many essential respects.

In 1827, all Regulations relating to law and justice, passed previously, were rescinded. A new Code was passed, and the

system of judicature was entirely remodelled. The groundwork of the new system was still the same as the Cornwallis' system of 1793. Native Commissioners were appointed in each zilla for trying and deciding civil suits. Their number and jurisdiction could be varied by the Local Government. They could not, however, decide cases below Rs. 500/- and above Rs. 5000/-.

Each district was to have a Judge to preside over the Zilla Court, which could take cognisance of all kinds of original civil cases. The Court also had appellate jurisdiction to hear appeals from the Courts of the Native Commissioners. Appeals from the Zilla Court went to the Sadar Diwani Adalat.

Provisions were made for the appointment of Assistant Judges. Senior Assistant Judges could ordinarily decide cases up to 5000 rupees, and up to Rs. 10,000 if especially authorised. Junior Assistant Judges could decide cases up to Rs. 500.

A Sadar Diwani Adalats consisting of three or more Judges was established to hear appeals against the decrees or orders passed by the Zilla Courts. The Adalat exercised important supervisory functions over the lower Courts.

Regulation XVII authorised the Collectors to take exclusive cognisance of matters of possession of land, tenures and land rent, boundaries, use of wells etc.

In the field of criminal law and justice, the Collectors were to act as the Magistrates. The Zilla Judge, besides his civil functions, had some criminal functions also. Known as the Criminal Judge, his Court constituted *in every district* the forum where crimes and offences of a less heinous nature could be tried.

Courts of Circuit were established for trial of crimes and serious offences in the country. The highest Court of criminal justice was the Sadar Fozdary Adalat which was identical with the Sadar Diwani Adalat.

The Collector-Magistrates also had some judicial powers. They were authorised to impose fine, ordinary imprisonment

with hard labour for one year, flogging up to thirty stripes and solitary imprisonment up to one month.

This, in a nutshell, was the scheme of Judicial Institutions established in the Province of Bombay in 1827. It is apparent that the scheme had a close affinity with the Cornwallis' scheme of 1793.

In course of time, certain modifications were effected in this plan. In the field of civil justice a noteworthy change took place in the year 1831 when the status of the Native Judges, hitherto known as Native Commissioners, was enhanced. Regulation XVIII of that year established three grades of Native Commissioners. The foremost were known as the Native Judges who were authorised to decide original suits of any amount and who could also exercise minor appellate powers over the Courts of the other two lower categories of Native Commissioners. Second in rank after the Native Judges came the Principal Native Commissioners who were authorised to decide original causes up to Rs. 10,000/-. The lowest in grade were the Junior Native Commissioners who were entitled to decide original causes up to 5000 rupees.

Act XXIV of 1836, passed by the Governor General in Council, changed the designations of the Native Commissioners when the Native judges, Principal Native Commissioners and Junior Native Commissioners were renamed as Principal Sadar Ameens, Sadar Ameens and Munsiffs respectively.

In the field of criminal justice, Regulation IV of 1830 abolished the Courts of Circuit and vested their jurisdiction in the Zilla Judges who thus came to be known as the Sessions Judges.

NON-REGULATION PROVINCES

For an appreciably long period the whole of British India comprised of only the three provinces of Bombay, Madras and Bengal, Bihar and Orissa. Starting as small trading establishments in the 17th century, these presidencies swelled into provinces in course of time as more and more territories were

acquired and added to each of them. Each of these provinces had a Government of its own. Bombay and Madras, however, were subordinate to the Government of Bengal.

Each of these Governments had powers to make laws for the territories under its control. By virtue of these powers, each Government enacted a separate Code of Regulations. Hence these three provinces were known as the Regulation Provinces. In 1800, Banaras was made a part of the Bengal Province ; there also the system of Regulations prevailing in Bengal was extended.

Until quite a late date no Statute of the British Parliament gave any power to provide for the administration of any new territory, otherwise than by attaching it to one or other of the three historic presidencies. 'Whereas the territorial possessions of the United Company of Merchants of England trading to theEast Indies, in the peninsula of India, have become so much extended as to require further regulations to be made for the due government of the same', Act 39 and 40 George III., c.LXXIX enacted that from the time and after the passing of the Act it should be lawful for the Court of Directors to declare what part or parts of the Company's territorial acquisitions would be subject to the Government of which presidency. The Court of Directors thus had the authority to determine what places should be subject to a presidency.

Before long, the Company acquired large tracts of territory in India. They were so large, extensive and important that they could not be conveniently administered by being attached to the Bengal Presidency or any other presidency. There existed no legal provisions for administering any territory otherwise than by annexing it to any one of the presidencies. The new acquisitions were in a very different stage of development from the three provinces. It was thus not feasible to administer the newly acquired territories as part of a presidency and to introduce there all those institutions that had been developed in the old British territory after a long and patient process of evolution. The new territories were not regarded as being fit

to receive the mature and well developed administrative system of the Regulation Provinces. The result was that the newly acquired territories were not annexed to any presidency; they formed distinct units and in the absence of a legal provision to administer them as such, the Governor General in Council began to administer them in their executive capacity, presumably, under the powers conferred on him by the act of cession or conquest under the general principles of the constitutional law. None of the existing Regulations of the Bengal, Madras or Bombay Codes was applied to the new unattached territories *proprio vigore*, and there was no direct authority in the Governor General in Council to make laws for them. The new territories, therefore, came to be called as Non-Regulation Provinces as distinguished from the old Regulation Provinces of Madras, Bombay and Bengal. They were governed more or less under the executive orders of the Bengal Government.

Some of the important provinces like Punjab, Assam, Central Provinces and Oudh were Non-Regulation Provinces.

In the Regulation Provinces a mature and well advanced judicial system had been created in course of time. The major achievement in this respect was the separation between the agencies administering civil justice and those which looked after revenue affairs. These provinces were governed by a system laid down by elaborate Regulations which had been very gradually evolved.

In the Non-Regulation Provinces, this mature and complicated system of administration was not introduced all at once. Instead, a simpler system of administration had to be devised for them. All rules and ordinances needed to administer the Non-Regulation Provinces were issued by the Governor General in his executive capacity. In the field of law and justice, the system had created the distinguishing feature of *concentrating all the power—the executive, magisterial and judicial*—in the hands of the District Officer—there was not that measure of separation between the executive and judiciary as had already been achieved in the Regulation Provinces after a careful

process of experimentation. The judicial system in the Non-Regulation Provinces was very simple and everything depended on the personal character, vigour, initiative, and integrity of the local officers. The Officers enjoyed great discretion. The administration was conducted in accordance with simpler rules modified to suit circumstances of each special case.

The Regulation and Non-Regulation systems rested on different theories of government. The former represented *government by law—by fixed rules.* The latter represented personal government of an individual combining into him all the functions—executive legislative and judicial—who had almost unlimited discretionary power, not being bound by any law and being only responsible to his superiors. There was no distinction between judicial and executive functions. A number of matters had been provided for by local rules, circular orders, and official instructions, which emanated from the executive and not from any regular legislative authority.

As already noticed, there were no legal provisions expressly made by the Parliament for the governance of any territory unattached to any of the older presidencies and so there was really no legal basis for the administration of Non-Regulation Provinces in the executive fashion except, perhaps, the sanction of practice or the powers flowing from act of conquest or cession. The position was regularized only in 1861 when Section 25 of the Indian Councils Act provided that 'no rule, law, or regulation which prior to the passing of this Act, shall have been made by the Governor General, Governor General in Council, the Governor, Governor in Council and Lieutenant Governor for and in respect of any such Non-Regulation Province shall be deemed invalid only by reason of the same not having been made in conformity with the provisions of the Acts regarding powers and constitution of Councils and other authorities.'

With the establishment of the All-India Legislative Council in 1861, the task of reconstituting the judicial establishments in the so called Non-Regulation Provinces was taken in hand.

Act XIX of 1865, entitled the Punjab Courts Act, defined the jurisdiction of the Courts of Judicature in the Punjab. It established seven grades of Courts in the Punjab as follows :

1. The Court of Tehsildar : This Court was authorised to try suits not exceeding three hundred rupees in value or amount.
2. The Court of Assistant Commissioner with *ordinary* powers : This Court had powers to try suits not exceeding one hundred rupees in value or amount.
3. The Court of the Assistant Commissioner with *special* powers : This Court had jurisdiction to try suits not exceeding five hundred rupees in value or amount.
4. The Court of Assistant Commissioner with *full* powers : This Court was entitled to try suits not exceeding ten thousand rupees in value or amount.
5. The Court of the Deputy Commissioner : This Court was entitled to determine suits of every description without limitation in value or amount. Appeals from Courts numbering 1, 2, 3 were also heard by this Court.
6. The Court of the Commissioner : This Court had power to try and determine suits of every description without limitation of value. It could hear appeals from the Courts of fourth and fifth grades.
7. The Court of the Judicial Commissioner : This was the highest Court in the Province. In 1865, it was raised to the status of a Chief Court by the Punjab Chief Court Act XXII of 1865. The Chief Court was to be the highest Court of Appeal from the Civil and Criminal Courts in the Punjab.

All Courts in Punjab except the Chief Court were composed of Revenue Officers who had important revenue functions to discharge. They had some criminal functions also. In this way, even as late as 1865, the judicial system in the Punjab presented a very primitive spectacle. All functions—executive, judicial both civil and criminal, and revenue—were

mixed up together to be executed through the instrumentality of the same officers. There was no differentiation of functions. In the Regulation Provinces the task of administering civil justice had been very *clearly separated* from the revenue work. Non-Regulation Provinces compared very unfavourably with the Regulation Provinces in this respect.

A similar system was continued in Central Provinces and Oudh, the two other Non-Regulation Provinces, by Act XIV of 1865, known as the Central Provinces Act of 1865. It established *eight* grades of Courts. The Court of the Tehsildar of the second class could try cases up to one hundred rupees; a Tehsildar of the first class could try cases below three hundred rupees. The Courts of the Assistant Commissioners of the third class, second class and the first class could try cases not exceeding five hundred, one thousand and five thousand rupees in value respectively. The Court of the Deputy Commissioner could try every kind of a civil suit. It could hear appeals from the Courts of the first four categories. The Court of the Commissioner had original jurisdiction to hear every civil suit and appellate jurisdiction to hear appeals from the Courts of the Assistant Commissioner of the first class and the Deputy Commissioner. The Court of the Judicial Commissioner had power to hear and determine appeals from the original decisions in suits and orders of the Commissioner, and also special appeals from the decisions passed in appeal by the Courts of the Deputy Commissioners and Commissioners.

NON-REGULATION SYSTEM EQUATED TO REGULATION SYSTEM

The public opinion began to change with the passage of time. The primitive judicial system existing in the Non-Regulation Provinces came to be generally disapproved. It was an anachronism which had many drawbacks and defects. The officers entrusted with the responsibility to execute it often found themselves overburdened with work. Consequently, the less interesting work of administering justice suffered. The judicial work was often discharged by these Executive Officers in an *irregular, summary* and *executive* fashion. The pressure

of work on the officers was responsible for their discharging the judicial work *inefficiently*. Such a system might have been tolerated in the initial stages when a rough and ready kind of justice was accepted as sufficient for the requirements of the people. But then, conceptions underwent a radical change. The quality of judicial work done by the Executive Officers was often poor because they had no leisure to consult law books and examine the precedents of the Chief Court and the High Courts. This kind of justice no longer satisfied either the people or the authorities. The two Codes of Procedure[1] had come into operation. The Chief Court and the Judicial Commissioners' Courts began to demand more regularity and strict conformity with law and procedure from the Executive Officers in the discharge of their judicial work.

In 1872, Sir James Stephen advocated the abolition of the systems prevailing at the time in the Non-Regulation Provinces. In his opinion, the complete amalgamation through every grade of the service of judicial and executive functions was inconsistent with the proper administration of a regular system of law and, especially, of the Codes of Civil and Criminal Procedure. It took sometime for the Non-Regulation system of administering justice in an executive manner to be scrapped. The judicial system in such provinces came to be assimilated to the judicial system prevailing in the other advanced provinces—the so called Regulation Provinces.

The Punjab Civil Courts were remodelled on the new pattern by the Punjab Courts Act, 1918. The constitution and jurisdiction of new Courts of civil justice in Central Provinces came to be defined by the Central Provinces Act, 1917. Oudh was the earliest to abolish the Non-Regulation system, the new courts being instituted there under the Oudh Civil Courts Act, 1879.

The Punjab Chief Court gave place to the High Court of Judicature at Lahore in 1919. The Judicial Commissioner's

1. The Civil Procedure Code and the Criminal Procedure Code.

Court at Nagpur gave way to the High Court in 1936.

The Judicial Commissioner's Court at Oudh was raised to the status of the Chief Court by the Oudh Courts Act passed by the Legislature of U. P. in 1925 to meet the desires of the Taluqadars and other people of the province.

The Oudh Chief Court was amalgamated with the Allahabad High Court on July 26, 1948.

B

RACIAL DISCRIMINATION IN THE JUDICIAL SYSTEM

COMPANY'S COURTS IN BENGAL AND THE ENGLISH

British born subjects were originally exempt from the jurisdiction of the Company's Courts. Under the Regulating Act these persons, even though residing in the mofussil, were to be subject to the Supreme Court of Judicature at Calcutta. In Madras and Bombay also they were subject to His Majesty's Courts at the presidencies.[1]

In 1793, Cornwallis tried to redeem the situation by prohibiting the British subjects from residing beyond ten miles of Calcutta until and unless they executed a bond placing themselves under the jurisdiction of the Courts of Diwani Adalat in cases up to Rs. 500. As a result of this provision, cases up to five hundred rupees against the British subjects could be instituted in the Diwani Adalats in the mofussil. All cases beyond five hundred rupees, however, had to be instituted in the Supreme Court of Judicature at Calcutta.

Madras and Bombay adopted a similar scheme of things vide Regulation XVIII of 1802 and Regulation III of 1799 respectively.

The 107th Section of the Charter Act of 1813 enacted

1. 37 Geo. III. C. 142, establishing the Recorders' Courts.

that the British Subjects residing, trading, or holding immovable property in the provinces were to be amenable to the Company's Courts in civil suits brought against them by the Natives with, however, *a right of appeal to His Majesty's Courts at the several presidencies, in cases where an appeal otherwise lay to the Sadar Diwani Adalats. It was a privilege* given to British born subjects in cases in which they figured as defendants. The Supreme Court when engaged in trying appeals from the Mofussil Courts was to be guided by the same rules as were applied in the Company's Courts.

In 1814, Lord Hastings made certain reforms in the civil judicature of Bengal. At this time it was laid down that the Munsiffs and Sadar Ameens would not be empowered to take cognisance of any suits in which a British subject, European foreigner or an American happened to be a party. These persons, therefore, could not be sued in a Mofussil Court below the rank of Zilla and City Court. It was a discrimination sought to be introduced on a *racial basis.*

In 1826, some of the British subjects in the mofussil petitioned the Bengal Government for being made subject to the jurisdiction of the Sadar Ameens. The Government obliged these persons by enacting Regulation IV of 1827, whereby the Sadar Ameens were authorised to take cognisance of cases in which Europeans were concerned. This continued to be the law till 1831.

In 1831, Lord William Bentinck reconstituted the civil judicature of the country. The Native Judges—Munsiffs, Sadar Ameens and Principal Sadar Ameens—were again forbidden to take cognisance of any suit in which an European British subject, an European foreigner or an American happened to be a party.

The Charter Act of 1833 was calculated to increase the number of British residents in the mofussil of India. It thus became important and expedient for the Government to determine, before any great influx of such residents took place,

what jurisdiction the Company's Civil Courts should possess over them.

Macaulay, the first Law Member of India, appointed in consequence of the Charter Act of 1833, was of the opinion that the system, as far as possible, should be *uniform* and that no distinction ought to be made between one class of people and another, except in cases where it could be clearly made out that such a distinction was necessary to the pure and efficient administration of justice. It was, therefore, his view that the English and Natives be put exactly on the same basis in all the civil proceedings and that they be made amenable to all the Courts of the Company except that of the Munsiff. An exception was made in case of the Munsiff because of the apprehension that the Englishman would overawe him and extract more than justice from his Court.

To give effect to the policy of weeding out the privileges and to put any semblance of partiality in the dispensation of justice to an end, Macaulay wanted to abolish that privilege of the British residents in the mofussil by which they could go in appeal directly to the Supreme Court from the Mofussil Courts. Such a provision had a lowering and a demoralising effect on the Courts of the Company. In the words of Macaulay,'.....The chief reason for preferring the Sadar Court is this—that it is the Court which we have provided to administer justice in the last resort to the great body of people. If it is not fit for that purpose, it ought to be made so. If it is fit to administer justice to the body of the people, why should we exempt a mere handful of settlers from this jurisdiction.' Macaulay continued : 'There certainly is—I will not say the reality—but the semblance of partiality and tyranny in the distinction made by the Charter Act of 1813. That distinction seems to indicate a notion that the natives of India may well put up with something less than justice or that Englishmen in India have a title to something more than justice. If we give our own countrymen an appeal to the King's Courts in cases in which all others are forced to be content with the Company's Courts, we do in fact cry down the

Company's Courts. We proclaim to the Indian people that there are two sorts of justice, a coarse one which we think good enough for them, and another of superior quality which we keep for ourselves. If we take pains to show that we distrust our highest courts, how can we expect that the natives of the country will place confidence in them.'

ACT OF 1836

The Legislative Council of India passed Act XI of 1836, by which the *right of appeal, heretofore enjoyed by the British subjects, from the Company's Courts to His Majesty's Courts in the presidencies under Sec.* 107 *of the Charter Act of* 1813, *was taken away.* It was further enacted that no person, by reason of birth or descent, should be exempt in any civil proceeding from the jurisdiction of the Company's Courts above that of Munsiff in Bengal, Sadar Ameens and District Munsiffs in Madras. *No exception was made in the case of Bombay where all the Courts became entitled to decide such cases.* Vehement were the struggles of the indignant Britons against the Act, which came to be nick-named as the 'Black Act'. However, the Government was convinced of the expediency of the measure, and it refused to succumb to that agitation. To give to every Englishman, in a civil case, a right to bring the native plaintiff before the Supreme Court was to give every dishonest Englishman an immunity against almost all civil proceedings. Fighting an appeal in the Supreme Court was a terribly expensive proposition. It was not unlikely that the Indian who had won his cause in the mofussil would forgo his claim rather than submit to the threat of being dragged into the King's Court. The measure of 1836 was thus a very just, equitable step so far as the Indians were concerned.

In 1843, the *last vestiges of discrimination* in the field of civil justice were abolished in Bengal. The Englishmen were made amenable to the Munsiffs' Courts also, and thus all the Civil Courts in Bengal came to possess jurisdiction on every person irrespective of caste, creed or descent. In Madras the same thing happened in 1850. Act III of that year enacted that 'no

person whatever shall, by reason of place of birth, or by reason of descent, be, in any civil proceeding whatever, exempt from the jurisdiction of the Courts of the Sadar Ameens and District Moonsiffs'.

BRITISHERS AND THE COMPANY'S CRIMINAL COURTS

In the sphere of criminal law and justice, Englishmen continued to enjoy a privileged position of being exempt from the jurisdiction of the Courts of the Company for a much longer time than they did in the sphere of civil justice. The process of putting the British born subjects on the same footing in sphere of Criminal Justice as the natives of India made a very slow progress.

The Regulating Act had placed the British subjects of the Crown in Bengal, Bihar and Orissa under the criminal jurisdiction of the Supreme Court at Calcutta. They were not amenable to the jurisdiction of the Company's Criminal Courts in the mofussil. In 1790, Cornwallis completely renovated and reconstituted the criminal judicature of the country; the magistrates in the mofussil, were authorised to inquire into charges against the British subjects and *apprehend* them, if necessary. If there happened to be a *prima facie* evidence for the charge in a particular case, the Magistrate was to convey the accused under safe custody to the Judge of the Supreme Court for *committal* and *trial*. The Magistrate did not exercise any judicial functions over the British subject. He could not punish them by himself. He merely had a police function to discharge.

Parallel provisions were made for the provinces of Bombay and Madras.[1]

Other Europeans, not British subjects, did not enjoy any such privilege, they being amenable equally with the natives to the authority of the Magistrates and the Courts of Circuit.

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1. For parallel provisions in Bombay—See Reg. V. of 1799 Sec. XVIII and later Regulations—Reg. XII of 1827 S. 10. For Madras Reg. VI, 1802, S. 19.

JUSTICES OF THE PEACE

An Act passed by the British Parliament in 1793, 33 Geo. III c. 52, strengthened judicial control over the British subjects in the mofussil. It empowered the Governor General in Council, by commissions to be issued under the seal of the Supreme Court, to nominate and appoint covenanted servants of the Company or other British inhabitants, as the Justice of the Peace in all the presidencies and provinces. In pursuance of this provision, the Bengal Government passed Regulation II of 1796 making rules for the *commitment* of the British subjects in Bengal by the Magistrates all of whom were appointed as the Justices of the Peace under the Act. They were to *apprehend* the British criminals, take evidence against them and commit them for trial to the Supreme Court at Calcutta.

The above mentioned Act had also provided that all proceedings, judgments or orders of the Magistrates in the capacity of the Justices of the Peace could be removed by writ of *certiorari* to the Court of Oyer and Terminer and Gaol Delivery at the presidency at the instance of any of the parties thereby affected or aggrieved.

In the year 1807, 47 Geo. VI, c. 68, the Governors and Councils of Madras and Bombay were authorised to act as Justices of the Peace for those towns respectively, and to hold quarter sessions, four times a year.[1] They were also empowered by section 5 to issue commissions under the seals of the particular Crown's Court appointing British subjects or covenanted servants of the Company as Justices of the Peace for the provinces.

CHARTER ACT 1813

In 1813 the Charter Act, 53 Geo. III. C. 155, gave certain additional powers to the Justices of the Peace over the British subjects residing in the mofussil. Section CV, in view of the fact that the British subjects residing outside the presidency towns were subject only to the jurisdiction of His Majesty's

1. Section 4.

Courts, and were exempted from the jurisdiction of the Courts established by the Company, and whereas it was expedient to provide for more effectual redress for the native inhabitants of the mofussil, 'as well in case of assault, forcible entry, or other injury accompanied with force, which may be committed by the British subjects,' empowered the Magistrates of the zilla or districts to punish such offender by fine, not exceeding five hundred rupees, or two months' imprisonment in case of non payment of fine. All such convictions were, however, removable by writ of *certiorari*, into the Courts of Oyer and Terminer and Gaol Delivery established by the Royal Charter.

In 1832, it was thought expedient that other persons besides the covenanted servants of the Company, or other British inhabitants, should be capable of being appointed to the office of the Justice of the Peace for the towns of Calcutta, Madras and Bombay. Act 2 & 3 William IV, c. 117 enacted that the respective Local Government might appoint any person, not being a foreigner, as a Justice of the Peace for the three presidency towns.

It may, however, be noted that this provision did not permit the Government to appoint any one else, except covenanted servants of the Company or British subjects, as the Justices of the Peace for the mofussil beyond the presidency towns. In the presidency towns *anyone* could be appointed as the Justice of the Peace whereas outside these towns only Englishmen or the covenanted servants of the Company could beappointed. The system was changed in 1923[1] and thereafter any person, whether Indian or English, could be appointed as a Justice of the Peace.

The functions of a Justice of the Peace were threefold; first, the trial and punishment, under certain Acts and Statutes, of offences by summary conviction, without a jury; secondly, the investigation of charges with a view to committal or discharge of the accused person : and thirdly, the prevention of crime and breaches of peace.

1, See Criminal Procedure Code, Section 22.

MOVE TOWARDS EQUALITY

For a very long time the British subjects in India were amenable to the jurisdiction only either of the Justices of the Peace or the Supreme Courts of Judicature established by the British Crown.

In 1837, the Black Act was passed putting the British subjects under the jurisdiction of the Company's Civil Courts. Macaulay at the time had wished that the British settlers in the mofussil be also made subject to the criminal jurisdiction of the Company's Courts. But nothing happened and they continued to enjoy the old privileged position.

In 1843, Act IV of the Legislative Council of India, took away the right of *removal by certiorari* to the Supreme Courts, conferred by 53 Geo. III Ch. 1551. It was enacted that an appeal from the sentences of the Justices of the Peace should lie to the same Courts, and according to the same rules, as were provided in case of sentences passed by the Magistrates in the exercise of their ordinary jurisdiction. This provision was good so far as it went. The Englishmen, however, continued to enjoy certain privileges. Even for minor offences, they could only be tried by Justices of the Peace who had to be either Englishmen or covenanted servants of Company. They enjoyed a privilege in regard to serious offences for which they could be tried only by the Crown's Court.

Nothing was done in this respect for a long time. The British felons continued to enjoy exemption from the mofussil Courts at the cost of equal justice, to the annoyance of the Native community, whom they could oppress with very little risk of punishment. It was necessary to send the British offenders to Calcutta along with all the witnesses before they could be tried. This indulgence was abused by the Britishers who could thus baffle all efforts to administer justice. There was no real redress for wrongs for the poor were hardly in a position to prosecute the Britishers in the Supreme Court at the distance of many miles from their homes. It was an invidious distinction to have one description of tribunals for

the governors and another for the governed. It was unjust to the natives to exempt a class of wealthy persons, who enjoyed a right of free resort to the interior, from the jurisdiction of the local authorities, which were always open to them against the Indian people. There was often a complete denial of Justice.

In 1872, the revised Criminal Procedure Code was enacted by the Indian Legislature. The Act most unfortunately continued the principle of racial disability in the jurisdiction of the courts in the interior. Courts having Indian Judges could not try the British Europeans in criminal cases. Subject to this condition, the British born subjects were placed under the jurisdiction of the Courts in the interior of the country. This was an invidious distinction. It introduced a derogatory disability on Indian officials who otherwise were trusted with high judicial offices. The provision also detracted from the efficacy of judicial administration in the interior.[1]

Evidently, these provisions were obnoxious to the Indian sentiment. They meant a reproach on the Indian character. It led to one more *anomaly*. An Indian holding the office of the Presidency Magistrate could try an European British subject, for no restriction about the nationality of the Magistrate existed in the case of the presidency towns. But if the same officer was transferred to some responsible post in the mofussil, he became disentitled to try an European British subject.

Lord Ripon, the Governor General, decided to remove this serious anomaly from the judicial system of India. A reform was proposed by which all District Magistrates and

1. The scheme of the Act of 1872 was;
   1. The European British subjects in the mofussil had a right to be tried exculsively by men of their own race, who were either (a) Sessions Judges or (b) Magistrates of the first class being also Justices of the Peace.
   2. These Magistrates might in such cases pass sentences of imprisonment for not more than three months or fine not exceeding a thousand rupees, or both.
   3. The Sessions Judge could not pass any sentence other than a sentence of imprisonment for a term extending to one year, or fine or both. 4. Only the High Court could punish more severely.

   Besides these provisions, the European British subjects had some other privileges also. They had a right to apply to the High Court for a writ of *habeas corpus*.

Sessions Judges were to be entitled to try the British Europeans. Further, it was proposed to empower the Local Governments 'to confer these powers outside the presidency towns upon those members (a) of the covenanted civil service, (b) of the native civil service, (c) of the Non-Regulation Commission, who were already exercising first class magisterial powers and in their opinion, fit to be entrusted with these further powers'. These proposals were intended to remove from the law all distinctions based merely on the race of the Judge.

There was stiff opposition to this measure. The British European community would not agree to such a measure being passed. The Government had to give way. In 1884 an Act, known as the Ilbert Act, was passed which made provisions for mixed jury for the trial of European British subjects. The Jury was to consist of the Indians and Europeans or Americans.

The differential treatment on the basis of race continued to exist for long. In 1923, Act XII, or the Criminal Procedure Amendment Act, made some improvements in this respect. The European British subjects' right to be tried by the European Judges and Magistrates was entirely abrogated. The European and Indian accused persons were placed practically on a footing of equality. The only privilege available to the British subjects was to be tried with the help of a Jury consisting of a majority of Europeans or Americans.[1] A reciprocal right was allowed to the Indians for they could claim a jury consisting of a majority of the Indians.

With the independence of India, however, the last vestiges of racial discrimination in the field of criminal procedure in favour of Europeans and Americans were abolished. For this purpose, the Indian Parliament passed in 1949 Act No. XVII entitled 'The Criminal Law (Removal of Racial Discriminations Act'.

1. S. 275 of Criminal Procedure Code.

CHAPTER XV

THE MODERN JUDICIAL SYSTEM

INTRODUCTORY

In each Part A and Part B State there exists at present a High Court, which is the highest Court of appeal and revision in that State. Below the High Court, there functions in each State a net work of lower Courts of civil judicature. These lower Courts owe their existence and jurisdiction to enactments of the Local Legislature of the State.

BENGAL

The law relating to civil judicial establishments, excluding the High Court, in the State of Bengal is contained at present in the Bengal, Agra and Assam Civil Courts Act of 1887, being Act XII of that year. In 1935, this Act was amended in one important respect, that of enhancing the pecuniary jurisdiction of the lowest cadre of Civil Courts presided over by the Munsiffs.

There are three categories of Courts in the State :

1. The lowest in the ladder are the Courts of the Munsiffs having jurisdiction ordinarily up to Rs. 1,000, which may be extended by the Local Government up to Rs. 3,500.

2. The Courts of the Subordinate Judges come next. They have jurisdiction to take cognisance of all original suits irrespective of the monetary value.

3. The principal Civil Court of ordinary original jurisdiction in every district is the District Court. The main function of this Court, however, is to hear appeals from the Munsiffs and Subordinate Judges in all causes up to Rs. 5000. Appeals in all cases above Rs. 5000 go to the High Court direct.

The Local Government may appoint Additional Judges to discharge some of the functions of the District Judge if

the state of business pending before the District Court warrants it.

UTTAR PRADESH (EXCLUDING OUDH)

The constitution and jurisdiction of the Civil Courts in the State of U. P. excluding the area of Oudh, was originally regulated by the Bengal, Agra and Assam Civil Courts Act of 1887. This Act was modified in relation to U. P. by the Act IV of 1936. The structure of the Civil Courts in the State continues to be the same as it is in Bengal, with, however, some minor differences. The pecuniary jurisdiction of the Munsiffs in the State varies from two thousand to five thousand rupees. Further, the Courts of the Subordinate Judges, as they are known in Bengal, are designated as the Courts of the Civil Judges in U. P.

BOMBAY

The law which previously regulated the constitution of the Civil Courts in the then Province of Bombay was in a very unsatisfactory state. It was contained in a number of Regulations passed in different years, and it was very difficult to ascertain the law.

To improve matters, Act XIV of 1869 was passed which consolidated the law relating to the constitution and jurisdiction of the Civil Courts. The Act was amended, for the last time, in 1949. These provisions apply to the whole of the State of Bombay outside the town of Bombay.

In each district there is a Court of the District Judge, which forms the principal civil court of original jurisdiction in the district. Provisions have been made for the appointment of Joint Judges in the district if the state of civil business before the District Judge warrants it. The Joint Judge is to have co-extensive powers and concurrent jurisdiction with the District Judge, and he transacts such civil business as he may receive from the District Judge. Provisions are made for the appointment of Assistant Judges. An Assistant Judge is to hold his Court ordinarily in the same place in the same district

as the District Judge, but he may hold his Court elsewhere also within the district whenever the District Judge with the previous sanction of the High Court directs him to do so. The Assistant Judge may try original suits of value less than Rs. 10,000, as may be referred to him by the District Judge. He may exercise appellate jurisdiction also if authorised by the Government in that behalf.

Below the District Court, there are a number of Subordinate Courts in a district presided over by Civil Judges. The Civil Judge of the Senior Division may take cognisance of all original suits and proceedings of a civil nature.

The Civil Judge of the Junior Division has jurisdiction to try all original suits or proceedings of a civil nature where the subject matter does not exceed Rs. 5000 in value. They may, however, be authorised to try cases up to Rs. 7500. Joint Civil Judges may be appointed to assist the Civil Judges and to dispose of such business as may be allotted to them by the Civil Judges whom they are deputed to assist.

In all cases where the subject matter involved is over Rs. 5000, appeals lie to the High Court. In all other cases appeals go to the District Court.

MADRAS

The constitution and jurisdiction of the Civil Courts in the province of Madras, outside the limits of the town of Madras, were settled by the Madras Civil Courts Act 1873 which, as subsequently amended by the Madras Act 1885, the Decentralisation Act, 1914 and other later Acts, still governs the organisation of the civil judiciary in the State. The system of civil judicature in Madras closely follows the Bengal pattern.

Each district has a District Court and a number of Subordinate Judges and Munsiffs. The Munsiff is authorised to decide suits up to a value of Rs. 3000. The jurisdiction of a District Judge and a Subordinate Judge extends to all original suits or proceedings of a civil nature.

Appeals from the District Court lie to the High Court. Appeals from decrees or orders of the Munsiffs and Subordinate Judges lie to the District Judge. When the value exceeds five thousand rupees, appeals lie to the High Court.

Additional District Judges may be appointed if the state of business pending before a particular District Judge warrants it.

PUNJAB AND DELHI

The constitution and jurisdiction of the Civil Courts in Punjab are to be found in the Punjab Courts Act 1918 as modified by the later Acts of 1919 and 1922.

There are various categories of Courts in the State. A district contains a District Court and a number of Courts of Subordinate Judges.

The Subordinate Judges have been classified into four classes. The Subordinate Judge of IV class is authorised to deal with cases up to a value of Rs. 1000. The Subordinate Judge of III class may decide cases up to Rs. 2000; The Subordinate Judge of II class, up to 5000; the Subordinate Judge of the first class may take cognisance of all civil cases without any monetary restriction.

The District Court has appellate jurisdiction and forms the principal civil court of original jurisdiction in the district. It hears appeals from the Subordinate Judges in cases where the subject matter does not exceed Rs. 5000. In other cases appeals go directly to the High Court.

OUDH

The Civil Courts in Oudh were constituted on the modern basis by the Oudh Civil Courts Act of 1879. This Act was replaced by the Oudh Courts Act, No. IV of 1925, which again was amended by the Oudh Courts (Amendment) Act, 1939. The District Court is the principal civil court of original jurisdiction whose original jurisdiction extends to all suits. Additional Judges may be appointed in a district if necessary

to relieve the District Judge. The Court of the Civil Judge may take cognisance of any case or suit without restriction as regards value. The jurisdiction of the Munsiff extends to all suits in which the amount or value does not exceed two thousand rupees, though the High Court may extend the jurisdiction of any Munsiff up to Rs. 5000. Appeals from Munsiffs and Civil Judges in cases up to 5000 rupees lie to the District Court. In all other cases appeals go to the High Court.[1]

CENTRAL PROVINCES OR MADHYA PRADESH

The law as to the constitution and jurisdiction of the Courts of civil justice in this State is to be found in the Central Provinces Act, I of 1917.

The subordinate judiciary in the State is divided into three classes : The District Courts, the Courts of the Subordinate Judges, and the Courts of the Munsiffs.

Each district in the State has one District Court, and a number of Courts of the Subordinate Judges and the Munsiffs. A Munsiff has jurisdiction to hear and decide any suit or original proceeding of a value not exceeding Rs. 1000. The local Government, however, may extend his jurisdiction up to Rs. 2000.

The Court of the Subordinate Judge has jurisdiction to hear and try any suit or original proceeding of a value not exceeding Rs. 10,000. The District Court has jurisdiction to hear and determine any suit or original proceeding irrespective of the monetary value. It is the principal civil court of original jurisdiction in the district.

An appeal from the Court of a Munsiff lies to the District Court. From the Court of the Subordinate Judge appeal lies to :

(i) The District Court, if the value of the suit does not

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1. Originally, the Court of the Judicial Commissioner was created by the Oudh Civil Courts Act, 1879. The Judicial Commissioner's Court was raised to the status of a Chief Court by the U.P. Act IV of 1925, which was ultimately merged into the High Court of Allahabad.

exceed Rs. 5000; (ii) The High Court, where the value exceeds Rs. 5000.

Appeals from the decrees or orders of a District Court lie to the High Court.

The general superintendence and control over all the Civil Courts in the State has been vested in, and all such Courts are to be subordinate to, the High Court.

PROVINCIAL SMALL CAUSE COURTS

Besides the Courts above mentioned, there function in each State a few Courts of minor jurisdiction, which are known as the Small Cause Courts. The idea to provide cheap and quick justice in cases of small monetary value was responsible for the creation of these Courts in the country. They were originally constituted in 1860 by Act XLII. The law relating to the Small Cause Courts was consolidated and amended in 1865, which again was superseded by Act IX of 1887. The Act continues to be the basis of the modern Small Cause Courts in the country, with the exception of the three presidency towns of Bombay, Madras and Calcutta.

The Act authorised the Local Governments to establish Courts of Small Causes. These Courts are authorised to take cognisance of suits of a civil nature of which the value does not exceed *five hundred rupees*, or if the Local Government so directs, to the value of *one thousand rupees*. The Act excludes a number of categories of cases from the jurisdiction of the Small Cause Courts.

A suit cognisable by the Court of Small Cause shall not be tried by any other Court. The Court of Small Cause thus enjoys an exclusive jurisdiction within its limits.

The decisions of the Small Cause Courts are final. The High Court in the State, however, exercises the power of revision. The High Court, for the purpose of satisfying itself that a decree or order made in any cause decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit.

A Court of Small Causes is subject to the administrative control of the District Court and to the superintendence of the High Court.

The Small Cause Courts provide a medium for the economical and expeditious disposal of petty litigation, suits of simple character and small pecuniary value. The great merit of these Courts is that speedy justice is done and the parties get an early decision on the matters in dispute between them, so that a petty litigation is not prolonged and carried to an undue extent. It will not be an exaggeration to say that there is no class of officers who have done so much to render legal redress easy, speedy and cheap in the ordinary transactions between man and man, as the Judges of the Small Cause Courts. In recognition of their merit and utility and to enable them to function in a wider sphere, the Civil Justice Committee, appointed by the Government of India to suggest ways and means to provide for the more speedy, economical and satisfactory dispatch of judicial business in the Courts, suggested an extension of their jurisdiction by authorising Small Cause Courts to try some of those classes of suits which are exempted from their cognisance at the present moment.

SUMMARY

The arrangement of Civil Courts in various States may be summarised as follows :

High Courts : There is a High Court in each State of Parts A and B.

District Courts : Next below the High Court, is the District Court in each State which is the principal civil court of original jurisdiction in the district. It is also a Court of appeal from the decrees and orders of subordinate Courts in cases up to Rs. 5000.

Lower Courts : Next below the District Courts are the Courts of Judges who have different designations in different States such as Subordinate Judges, Civil Judges, Civil Judges of class one etc. In Central Provinces their pecuniary jurisdiction extends to suits of the

value not exceeding Rs. 10,000. In other States, their jurisdiction extends to all original suits of any value.

Next in order come the Courts of Judges who also have different designations in different States such as Munsiffs, District Munsiffs, Civil Judges (Junior Division), Civil Judges class II. Their pecuniary jurisdiction also varies from State to State between Rs. 1,000 to 5,000.

Then come the Courts of Small Causes having jurisdiction upto 500 to 1,000 rupees according as the particular State Government deems it fit to invest them.

COURTS OF MINOR JURISDICTION.

Besides the Courts mentioned above certain States have Courts of minor jurisdiction like the Courts of honorary Munsiffs in Uttar Pradesh, Courts of Mamlatdars, Village Munsiffs in Bombay and Village Courts in Madras. These Courts function under local enactments and it is not necessary to go into the details here.

Practically every State has made provisions for starting Village Panchayat Courts having minor jurisdiction and judicial functions. The discussion of the present judicial system prevailing in the various States would not be complete without noticing the Village Panchayat System, the revival and revitalization of which is the primary aim of every State Government, because Village Panchayats are regarded as the most important step towards the programme of village uplift.[1] Every State has its own local legislation to regulate the Village Panchayats. The whole system, however, is still in an experimental stage and it is too early to say as to how far the Village Panchayats will be able to take part in the administration of justice in the country.

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1. The Constitution of India has prescribed a Directive Principle of State Policy. Article 40 lays down : 'The State shall take steps to organise Village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.'

However, the Punjab Village Panchayat Act put on the statute book in 1939 may be taken as a model for discussion. According to the Act, the number of *Panches* in a Village Court must not be less than three and not more than seven. These *Panches* are elected by the adult male inhabitants of the village. The qualification for the purposes of voting are :

(i) payment of land revenue in the village ;
(ii) payment of choukidara tax, and
(iii) residence for a period of twelve months before the preparation of voters' register.

On election, the *Panches* elect a *Sarpanch* and a *Naib Sarpanch* to preside over the sittings of the Panchayat. The Government may remove a *Panch* for various reasons, as for example, misconduct, insolvency or failure to perform his duties. A Panchayat is liable to be suspended for incompetence. default or abuse of its powers. The meetings of the Panchayat are to be held in public so that their decisions are free from the suspicion of partiality or injustice.

The Panchayat's duties are multifarious. It has judicial functions both in civil as well as in criminal fields. It may deal with several minor offences and punish an accused to pay a fine not exceeding fifty rupees. In special cases this fine may be increased to Rs. 200. The Panchayat by itself cannot inflict a sentence of imprisonment. If it thinks that under the circumstances of a particular case a sentence would be inadequate, the complainant may be directed to go to a Magistrate. The District Magistrate has to keep a general supervision over the work of Panchayats in the district and he can interfere with the sentences passed by the Panchayats after proper inquiry.

On the civil side, Panchayats have got jurisdiction in respect of the following three types of cases :

(a) suits for money or goods due on contract or price thereof ;
(b) suits for the recovery of movable property or the value of such property ; and

(c) suits for compensation for wrongfully taking or injuring movable property provided the claim does not exceed ordinarily two hundred rupees. Some Panchayats may be specially endowed in this behalf to deal with cases up to Rs. 500.

Plaintiff may institute a suit with the Panchayat by a written plaint. The procedure laid down for trial of causes has been designed with a view to avoid delays and technical difficulties. Decrees passed by the Panchayats may be executed only through the instrumentality of the ordinary Civil Courts. Supervisory jurisdiction over the Panchayats is vested in the District Judge who may, in proper cases, interfere with the decrees of of the Panchayat.

CIVIL JUDICATURE IN PRESIDENCY TOWNS

In the three presidency towns of Calcutta, Madras and Bombay, the scheme of civil judicature is different from the rest of the country, primarily, due to historical reasons.

In the first place, the respective High Courts at each place enjoy an original civil jurisdiction within the limits of the town. The ordinary original civil jurisdiction of each of the three High Courts extends to all civil causes of every description except those which are taken cognisance of by the Small Causes Courts and other local Courts.

In the second place, there are Courts of Small Causes. These Courts have a long history behind them. In 1753, the Judicial Charter of George II established courts of petty civil jurisdiction in each presidency town which were then known as the Courts of Requests in the three towns.[1] They were empowered to determine small suits where the matter in dispute did not exceed five pagodas. These Courts proved to be very beneficial and convenient instruments of justice as they could mete out justice in petty cases quickly and cheaply. It was, thought to be desirable to extend the jurisdiction of these Courts. By

1. See page 49.

an Act of 1797,37 Geo. III, c. 142, s. XXX, passed by the British Parliament for the better administration of justice in the three presidency towns, the jurisdiction of the Courts of Requests was extended to *eighty rupees*.

Within two years, Act 39 & 40 Geo. III. c. 79 was passed by the British Parliament. Section XVII of the Act empowered the Governor General in Council of Fort William, and the Governor in Council of Fort St. George to alter the form, constitution and procedure of the Courts of Requests at the two places. The Governments could also fix the monetary ceiling up to which the Courts of Requests could take cognisance of suits. This limit, however, could not be over 400 rupees.

In pursuance of this authority, the Government at Fort William effected some modifications in the constitution of the Court of Requests at Calcutta and enhanced its jurisdiction to Rs. 400.

The Courts of Requests in the three presidency towns were abolished by Act IX of 1850 and new courts to be known as the Courts of Small Causes were established in their place. They were to be courts of record. The jurisdiction of the newly created Courts of Small Causes was to extend to suits for sums not exceeding *five hundred rupees*. The Courts had power to make rules of practice and procedure subject to the approval of the respective Supreme Courts. Any Judge or Judges of the Supreme Court might act as the Judge or Judges of the Small Cause Court for that presidency town.

The Supreme Court might remove to it any cause from the Court of Small Causes in the presidency town if the cause exceeded one hundred rupees in value and involved some question of law or equity which due to its difficulty, novelty or general importance appeared to be fit to be tried by the Supreme Court. A question of law or equity might be reserved by the Court of Small Causes for the opinion of the Supreme Court.

The jurisdiction of the Supreme Court was concurrent with the Court of Small Causes in the presidency town. To force persons to bring their petty cases in the Court of Small Causes instead of the Supreme Court, it was laid down that, if any case cognisable by the Court of Small Causes was commenced in the Supreme Court and verdict was less than five hundred rupees in an action founded on contract and one hundred rupees if based on wrong, the plaintiff was to have only the judgment and no costs unless the Judge of the Supreme Court certified that on account of difficulty, novelty or general importance of the case it was a fit one to be brought in the Supreme Court.

The procedure under the Act of 1850 was essentially similar to the procedure of the English county courts previous to the Common Law Procedure Act, 1852.

By Act XXVI of 1864, known as the Presidency Towns Small Cause Courts Act, the jurisdiction of the Presidency Small Cause Courts was extended to suits for sums *not exceeding one thousand rupees*; and, with the consent of parties, to suits of higher value. In suits for sums exceeding five hundred rupees the Judges were to reserve any question of law or equity or any question as to the admission or rejection of any evidence as to which they entertained any doubts, or which they were requested by either party to reserve for the opinion of the High Court. Any question on which the two Judges of the Court of Small Causes differed was also to be so reserved.

The Courts of Small Causes in the presidency towns at the present moment function under the Presidency Small Cause Courts Act, 1882 as slightly amended subsequently. In each of the towns of Calcutta, Madras and Bombay, there is to be a Court, to be called the Court of Small Causes. The Small Causes Court is subject to the superintendence of the High Court of Judicature at Fort William, Madras or Bombay as the case may be, and is to be subordinate to the High Court. The local limits of the jurisdiction of each of the Small

Cause Courts corresponds with the local limits for the time being of the ordinary original civil jurisdiction of the High Court. The Court has jurisdiction to *try cases of a civil nature when the amount or value of the subject matter does not exceed two thousand rupees.* With the consent of parties to a suit, the Court of Small Causes may try a suit although the amount or value of the subject matter thereof may exceed two thousand rupees.[1]

Not all the cases of a civil nature can be tried by the Court. Section 19 lays down a long list of the classes of cases the Court is ineligible to try. Suits relating to revenue, recovery of immovable property, partition of immovable property, suits for the restitution of conjugal rights are, among others, some important categories of cases which the Small Cause Court may not take into cognisance.

Under section 39, a suit involving subject matter valuing over one thousand rupees may be removed to the High Court on the application of the defendant. The defendant *is entitled* to such an order from the High Court *as of right* unless the application has been made solely for the purpose of delay.

If two Judges of the Small Cause Court sitting together in any suit differ in their opinion as to any question of law or usage, they may refer the question for the opinion of the High Court. Similarly, if in any suit the value of subject matter exceeds five hundred rupees and the Court entertains reasonable doubt on any point of law or usage and either of the parties to the suit so requires the question is to be referred to the High Court for opinion.

Subject to the superintendence of the High Court every decree or order of a Small Cause Court shall be final and conclusive. (Section 37)

Before the present enactment regulating the Presidency Towns Small Cause Courts was passed in 1882, these Courts stood on the same footing as the English County Courts. They

1. Section 20.

had been left to a great extent untouched by the important legislation by which, at that time, the procedure of the other civil courts in the country had been reformed. The result of this was that the Small Cause Courts became somewhat *antiquated* and did not fit in with the rest of the Indian Judicial System. Their powers and procedure were in many particulars very defective, and that though, owing to the efficient manner in which the Small Cause Courts in the presidency towns had been worked, they generally gave satisfaction to the authorities and to the litigants, yet often many questions came to be discussed in them which were totally foreign to the people who resorted to them, and some of which had only an historic interest even in England. A need of completely revising the law relating to these Courts was thus being very keenly felt for some time and the present Act of 1882 was the result.

In Bombay and Madras some minor adaptations have been incorporated in the Presidency Small Cause Courts Act so as to integrate into the picture the City Civil Court started at each of the places. It is not necessary to take any notice of the adaptations here.

THE MADRAS CITY CIVIL COURT

A Civil Court was established in the town of Madras by the Local Government under powers conferred on it by the Madras City Civil Court Act passed in the year 1892.

The idea of starting such a Court was to provide some relief to the Madras High Court on its ordinary original civil side which was authorised to decide all civil cases arising within the local limits of the Madras town. The Presidency Court of Small Causes gave some relief but it was insufficient to meet the exigencies of the situation, as its jurisdiction was limited to two thousand rupees. Also, there were certain classes of cases which were outside the purview of this Court. It thus became necessary to make provisions for the trial of some more suits by some instrumentality other than the High Court. Apart from the question of giving some relief to the High Court which was, of course, a great waste of judicial talent,

there was the important question of *costs*. The proceedings in the High Court were costly which caused a denial of justice to those who were unable to bear the expenses of a trial in the High Court. To meet all these circumstances, a City Civil Court was created for the town of Madras.

The City Court is not entitled to decide admiralty, testamentary, intestate or matrimonial cases as also cases arising out of insolvency and cases cognisable by the Small Cause Court being below one thousand rupees in value. Cases between one thousand and two thousand rupees may be instituted either in the City Court or in the Small Cause Court.

To start with, the jurisdiction of the City Court was limited to two thousand and five hundred rupees. Since 1st December, 1948, its jurisdiction has been extended up to 10,000 rupees.

The jurisdiction of the City Court extends within the same local limits as the ordinary original civil jurisdiction of the High Court. It may try civil cases only. Appeals from the City Court lie to the High Court. The institution of the City Court does not affect the ordinary original civil jurisdiction of the High Court which enjoys a concurrent jurisdiction with the City Court. It is, however, laid down that if a suit is instituted in the High Court which, in the opinion of the Judge trying it, ought to have been instituted in the City Court, no costs shall be allowed to a successful plaintiff, and a successful defendant shall be allowed costs as between attorney and client. It has been further provided that in any suit or proceeding pending at any time in the High Court, any Judge may make an order transferring the same to the City Court if in his opinion such suit or proceeding is within that Court's jurisdiction and should be tried there.

THE BOMBAY CITY CIVIL COURT

Closely following the model of the Madras City Civil Court, there came into existence a City Civil Court at Bombay under the provisions of the Bombay City Civil Court Act passed

by the Local Legislature in 1948. The Court is entitled to try all civil suits with the exception of admiralty, testamentary and intestate, matrimonial, insolvency and Small Cause Cases. The Act laid down 10,000 rupees as the pecuniary limit for the Court's jurisdiction which could be extended by the Government up to Rs. 25000. The jurisdiction of the High Court is barred.to the extent of the City Court's jurisdiction. The High Court cannot try any suit cognisable by the City Court. For special reasons, however, the High Court may remove for trial by itself any suit or proceeding from the City Court. Appeals from the City Court lie to the High Court. If in any suit instituted in the High Court, the Judge is of the opinion that the case ought to have been instituted in the City Court, and the decree is for less than the maximum triable by the City Court, the successful plaintiff will not get any costs.

SUMMARY

In the presidency towns, therefore, the existing Civil Courts are: (i) High Court in its ordinary original civil jurisdiction and (2) Presidency Court of Small Causes. Besides these, Bombay and Madras, each, has an additional City Civil Court.

NEW CONSTITUTION AND THE SUBORDINATE JUDICIARY

To ensure a proper functioning of the Courts, the new Constitution, under Article 227, invests every High Court with powers of superintendence over all Courts and tribunals throughout the territory in relation to which it exercises jurisdiction. The Constitution thus confers on the High Courts sufficiently wide powers, both administrative and judicial, in relation to the Subordinate Courts.

In the interest of *pure and impartial justice* and also with a view to secure independence of the subordinate judiciary, the new Constitution makes certain provisions which follow very closely the analogous clauses in the Government of India Act, 1935. The High Court Judges are to be appointed by the President and they hold office during good behaviour up to

sixty years of age. Their independence has thus been ensured. But so far as the subordinate judiciary is concerned, appointments are usually in the hands of the Local Executive Government which continues to exercise a certain measure of control over the Judges even after their appointment in such matters as promotion, posting etc. In the absence of any safeguards to protect the interests of the Judicial Officers after appointment, it is possible that some nepotism might creep in the judicial ranks if such questions as of promotion from grade to grade in a judicial hierarchy are left in the hands of a Minister exposed to pressure from members of a popularly elected Legislature. Nothing is more likely to sap the independence of a Judge than the knowledge that his career depends upon the favour of a Minister. It is the subordinate judiciary which comes closely into contact with the people, and it is no less important—perhaps, indeed, even more important—that their independence should be placed beyond question than in the case of a superior Judge. For an efficient administration of law and justice in the country it is necessary to ensure that the subordinate judiciary remains above corruption and nepotism. It is with this in view that the Constitution of India incorporates some provisions covering the subordinate judiciary.

Article 233 makes provisions for the appointments, postings and promotions of District Judges. The Governor of the State *in consultation with* the High Court is charged with this responsibility. A person, not already in the service of the Union or of the State, shall only be eligible to be appointed a District Judge if he has been, for not less than seven years, an advocate or a pleader and is recommended by the High Court for appointment.

Appointments of persons to the judicial service of a State, other than the District Judges, shall be made by the Governor of the State in accordance with the rules made by him in consultation with the State Public Service Commission and the High Court of the State. The Constitution thus lays down for the whole of India a uniform method of selection and appointment to the subordinate judicial service. The provision has

been borrowed from the Government of India Act, 1935. Before the Act of 1935, methods of appointing the subordinate judicial officers were not uniform ; they varied from province to province. Under section 7 of the Madras Civil Courts Act, 1873, the recruitment of Munsiffs in Madras was vested in the Madras High Court. Similar provisions were to be found in the Civil Courts Acts of a few other provinces. In some other provinces, however, the power of appointment was vested in the Local Government. The Act of 1935 introduced, for the first time, uniformity amongst this diversity. Section 255 of the Government of India Act introduced a uniform system of appointment to, and control over, the subordinate judiciary with the result that section 7 of the Madras Act was repealed and the High Court no longer remained the appointing authority in regard to the Munsiffs. The new Constitution does not disturb the uniformity already achieved and incorporates similar provisions in this respect as its predeces or the Act of 1935 contained.

After appointment, the Government ceases to have any control over the subordinate judicial officers other than the District Judges. Their posting, promotion, as also the authority to grant leave to them, are vested in the High Court. Enough care has thus been taken to secure the *independence* of the judiciary even in its lower grades which after all is so essential for an effective and impartial administration of justice.

DEFECTS

The system of law and justice and the machinery to administer the same are, perhaps, the most valuable legacies that the British have left behind in India. The British system of administration of justice is unique and unparalleled. The judiciary occupies a unique place of importance in the Constitution of Great Britain. It ensures to the citizens that the law is supreme and the Judges, while dispensing justice, look to none but the laws of the land and their own conscience. The English brought with them that system of judicial administration which has been the pride of Great Britain. The grand English legal traditions like the Rule of Law and administration

according to law, the independence of the judiciary, justice according to law and respect for law, have all been duly incorporated in the present Judicial System in India.

The system is not, however, perfect. There are some defects which need the immediate attention on the part of the Authorities that be. One great defect is the *law's delay*. Appalling arrears of cases are pending in the Law Courts—not only in the lower Courts but also in the High Courts. It is a great hardship to the litigant public. It may take five or six years before a small suit is finally disposed of in appeal by the High Court. *Justice delayed is justice denied.* The delay in the disposal of suits and appeals in the course of administration of justice shakes the public confidence in law and justice. The administration of justice falls into disrepute. The commercial and industrial progress of the country is retarded. This has been a *perennial problem* engaging the attention of the Government, but still it has defied solution. In 1924, the Government of India appointed a Committee to go into the question of law's delay and suggest ways and means 'to provide for the more speedy, economical and satisfactory despatch of the business transacted in the courts.' The Civil Justice Committee submitted its Report to the Government in 1925. But the position has not improved since then.

Another very *just criticism* of the judicial system is the huge cost of litigation. Litigation at present is an extremely costly proposition and a *luxury* in which only the rich can indulge. Every plaintiff has to pay court fees the amount of which is exorbitant. Under the circumstances the poor have often to go without justice. Here the State should do something. The idea of the State selling justice by levying court fees, is against all canons of good government. It is the *primary obligation* of every government to provide to its subjects justice—impartial and free justice. No charge or court fee is payable for causes filed, heard and decided by the Courts in England and there is no reason why a similar rule cannot prevail here in India.

Another step that the Government can undertake to alleviate the difficulties and sufferings of the poor, so as to enable them to obtain justice, is to initiate some scheme by which monetary assistance may be given to a needy poor litigant who wants to establish a rightful claim or vindicate his honour. It is no use maintaining a judicial machinery if it is beyond the means of an average citizen to take recourse to it whenever he suffers a wrong. A measure to provide assistance and aid to the poor in prosecuting their claims will strengthen respect for law, which is such a great asset in a democratic country. In England the Socialist Government was successful in introducing a comprehensive scheme to provide legal aid and advice to persons of limited means. It is high time that some such thing is done here in India also.

CRIMINAL COURTS TO-DAY

The modern Criminal Courts function throughout the country under the provisions of the Criminal Procedure Code, Act V of 1898. The Criminal Courts may be said to lie on *three separate rungs* of an ascending ladder. On the lowest rung there are the Courts of the Magistrates. Next above the Magistrates come the Sessions Courts. Finally there are the High Courts subject to the ultimate jurisdiction of the Supreme Court which is the highest Court of the land.

Outside the presidency towns there are a number of Magistrates in the districts. They are District Magistrates, Additional District Magistrates, Magistrates of the first class, Magistrates of the second class, Magistrates of the third class, Section 30 Magistrates and Sub-Divisional Magistrates.

Magistrates of the third class are authorised to try various offences of a *minor* character. The maximum which they can award is a sentence of one month's imprisonment, simple or rigorous, and a fine not exceeding fifty rupees. The Magistrates of the second class are authorised to pass sentences of imprisonment for a term not exceeding six months and fine not exceeding two hundred rupees. The Magistrates of the

first class are empowered to award a sentence of imprisonment not exceeding two years and a fine not exceeding one thousand rupees. Section 30 Magistrates are first class Magistrates with enhanced powers. They have power to try all offences not punishable with death. The Local Government may invest any Magistrate of the first class with powers under section 30, who can then pass any sentence *except* one of death or of transportation or imprisonment for over seven years.

Every district has a Magistrate of the first class who is called the District Magistrate. Additional District Magistrates are also first class Magistrates. A Magistrate of the first or second class may be placed in charge of a sub-division. Such a Magistrate is known as Sub-Divisional Magistrate.

The District Magistrates or Additional District Magistrates have appellate powers also. Thcy hear appeals of persons convicted by the second or third class Magistrates. All Magistrates in the district are subordinate to the District Magistrate.

The Magistrates in the presidency towns are designated a little differently. They are known as Presidency Magistrates. There is one Chief Presidency Magistrate in each town. There may be a number of Additional Chief Presidency Magistrates. Presidency Magistrates are entitled to pass the same sentences as the Magistrates of the first class. Appeals from them lie to the High Court if the sentence awarded is for imprisonment for a term exceeding six months or fine exceeding two hundred rupees.

Next after the Magistrates come the Sessions Courts. In every district there is a Sessions Court. These Courts try all the more serious offences such as dacoities, all types of homicide, serious thefts by habitual offenders etc. A Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by him is subject to confirmation by the High Court. The Sessions Judge has appellate jurisdiction

also. He hears appeals from the District Magistrates and the Section 30 Magistrates.

Finally, there exist the High Courts which have powers to hear appeals, revisions and references. In the presidency towns the High Courts exercise the ordinary original criminal jurisdiction also. In this capacity they discharge the functions of the Sessions Court for these towns and thus try all offences of a serious nature. All persons convicted by the Sessions Judge and all persons who have been awarded a sentence of imprisonment exceeding four years by Section 30 Magistrates are entitled to appeal to the High Courts. No sentence of death can be carried out without the confirmation of the High Court. There are several other powers of revision and reference which are conferred on the High Courts by the Criminal Procedure Code.

Ordinarily the High Court is the final Court of Appeal in criminal cases. But, in rare cases, appeals may further go to the Supreme Court of India.

DEFECTS

The one defect in the working of the machinery of criminal justice is in the appalling state of the arrears. A person accused of a crime has to remain in suspense for an unnecessarily long time before his case is finally disposed of.

The greatest vice that afflicts the modern system of criminal justice in India is the combination of the Executive and the Judiciary. A Magistrate to-day, apart from his other executive functions, is both a thief-catcher and a Judge. This combination is very anomalous in theory and very mischievous in practice. In many cases he conducts an enquiry into the allegations made against a particular individual and after that he himself proceeds to try and punish this man. The Magistrates have police functions as well as judicial duties. Such a system injures public confidence in the Criminal Courts. A magistrate can easily misuse and misapply the powers vested in him. The police functions must, therefore, be separated from the judicial functions.

Indians have agitated too long for such a reform. No body questions the *wisdom* and *expediency* of this measure. The Constitution has specifically accepted the policy of separating the Judiciary from the Executive. Article 50 in the Chapter of Directive Principles of State Policy of the Constitution lays down, 'The State shall take steps to separate the Judiciary from the Executive in the public services of the State.'

The pernicious and mischievous system has been too long in operation. It is time that this unhappy union—of the Executive with the Judiciary—is abolished without delay.[1]

1. Certain States have embarked on this project on a limited basis. Madras, U. P. etc., have put some schemes in operation which are still in an experimental stage and so do not admit of conclusions one way or the other.

CHAPTER XVI

THE HIGH COURTS

INTRODUCTORY

The year 1861 is a conspicuous landmark in the process of development of the legal institutions in India. Hitherto, there existed two parallel judicial systems in the provinces of Bengal, Bombay and Madras. One set of Courts, being the Crown's Courts, consisted of the Supreme Courts of Judicature which functioned in the presidency towns. The other set of Courts, being the Company's Courts and having Sadar Courts at the apex, functioned in the provinces beyond the presidency towns.

In course of time, the existence of two parallel systems was found to be inconvenient. It was considered to be eminently *desirable* that a *greater unity and harmony* should be established in respect of the judicial administration. In the context of changed circumstances after 1858, the distinction between the Crown's Courts and the Company's Courts had lost all its *validity*. The year 1861, therefore, witnessed the merger of two sets of Courts and the consequent emergence of three High Courts in the three provinces. The process of establishing High Courts, initiated in 1861, continued, as a result of which more and more High Courts were created in India during the years to follow.

TWO JUDICIAL SYSTEMS BEFORE 1861

The Regulating Act of 1773 established a Supreme Court of Judicature at Calcutta. In 1781, the Parliament passed an Act to remove doubts and difficulties that had arisen out of the ambiguities of language of the Regulating Act and the Court's Charter.[1]

The general jurisdiction of the Supreme Court extended to the presidency town of Calcutta. Beyond Calcutta, it exercised jurisdiction over a few categories of persons only, viz., British subjects, servants of the Company etc. It exercised an

1. See chapter VII, p. 111

exclusive criminal jurisdiction over the European British subjects residing in the country.

The Supreme Court did not have any jurisdiction in any matter concerning *revenue*. It did not possess any appellate jurisdiction. Its whole jurisdiction was original.

The Supreme Court, for the most part, applied the English Civil and Criminal Laws. Exceptions were made in favour of the Hindus and the Muslims who were governed by their own respective personal laws in certain cases, viz., inheritance, succession and contract etc.

The Judges in the Supreme Court were barristers or *professional lawyers* sent out to India from England. They were appointed by the Crown and held office during its pleasure.

The procedure of the Supreme Court was based closely on the model of the procedure followed in the Courts of England.

Before 1833, the Supreme Court was not subject to the legislative authority of the Governor General in Council, it being bound only by those Regulations which had been registered with it.[1]

Besides the Supreme Court, the Company had its own judicial system which *catered to the needs* of the people *at large* residing in the provinces of Bengal, Bihar and Orissa beyond Calcutta. There was a regular hierarchy of Courts. The Sadar Diwani Adalat stood at the *apex* of the Diwani Adalats in the mofussil ; the Sadar Fozdary Adalat was the highest Criminal Court. There thus existed *two distinct judicial systems* in the provinces of Bengal, Bihar and Orissa. The Crown's system represented by the Supreme Court was completely different in character and nature from the judicial system of the Company.

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1. After 1833, the Supreme Court was bound to observe the Acts passed by the Governor General in Council; See chapter XIX.

The Mofussil Courts had *nothing to do* with the English Law. They were amenable in all respects to the Regulations of the Government. They administered justice in accordance with the Hindu Law, Mohammedan Law and the Regulations. In cases not covered by these, the Courts acted according to justice, equity and good conscience. The procedure of these Courts was prescribed from time to time by the Regulations.

The Parliament *accorded recognition* to the Sadar Diwani Adalat, and constituted it into a court of record in 1781.[1]

The Sadar Diwani Adalat and the Sadar Nizamat Adalat *did not have any original jurisdiction*. They were primarily Courts of appeal and they supervised the working of the lower Courts.

The Sadar Courts consisted entirely of the members of the civil service who had risen from the successive stages of the service, and who did not necessarily have the slightest legal training. These Judges were appointed by the Government and they held their office during its pleasure.

Similar judicial systems existed in the two other presidencies of Bombay and Madras.[2]

DEFECTS

The existence of *two* systems of judicature functioning *concurrently* and *independently* of each other in the three presidencies, was inconvenient for the Government as well as for the people. There was nothing common between these two parallel judicial systems. There existed a wide gulf between them. There was no meeting point and they often clashed.

The Supreme Courts exercised original jurisdiction principally within the limits of the respective presidency towns. The bulk of the Indians residing in the provinces, beyond the

1. See page 111
2. See Chapter, XIV

presidency towns were *immune* from their jurisdiction. They were mainly subject to the Company's judicial system which administered a refined scheme of native laws or rather the Anglo-Indian Law. Unfortunately, the boundary or the line of demarcation between them was not very distinctly or clearly defined. In some cases, the Indians in the interior of the country were also brought under and subjected to the jurisdiction of the Supreme Court. One such ground was the extended interpretation given to the word '*inhabitant*'. The Supreme Court at Calcutta under the Act of 1781—and for the matter of that every other Supreme Court—had original jurisdiction over the *inhabitants* of the presidency town.[1] By a process of interpretation the word *inhabitants* came to cover not only the actual residents of the presidency town but all those persons who had some property, a house, shop or agents in commercial dealings in the presidency town though they themselves might be residing in the interior of the country. All such persons were regarded as *constructive inhabitants* of the presidency town and were thus held subject to the Supreme Court's jurisdiction. In this way, many Indians residing in the interior of the country came under the Supreme Court's jurisdiction. Thus some Indians were *amenable to two sets of courts and two codes of laws.*

Sometimes the decrees of the King's Court interfered with the previous decrees of the Company's Court. Sometimes it so happened that *conflicting decisions* were passed by the Supreme Court and by the Sadar Diwani Adalat, regarding different portions of the same estate, on grounds equally applicable to all. Suppose a case in which a British subject A, got possession of part of an estate, while a native B, had seized the rest : the former was impleaded by the latter in the Supreme Court, the latter by the former in the Zilla Court, each in his own forum. There was no assurance of *consistency* of decisions in such a case.

The position was very inconvenient and unhappy. In 1829, Sir Charles E. Grey, the Chief Judge of the Supreme

1. See page 115.

Court at Calcutta, had occasion to comment on this situation. He then observed : 'There is an utter want of connection between the Supreme Court and the Presidency Courts, and the two sorts of legal process which are employed by them. Lamentable as it is that such a feeling should exist, the exercise of the powers of the one system is viewed with jealousy by those who are connected with the other....'[1]

With the passage of time, public opinion began to veer round the idea of amalgamation, merger and consolidation of what were regarded as the *two rival judicial systems.* It was thought that the Indians should have greater certainty as to the jurisdiction to which they were amenable, and greater security against the liability to two independent jurisdictions than they enjoyed, and that the most effective way to achieve this object was to unify the two systems. As early as 1829, Sir Metcalfe advocated a change, by which the Judicature of India, instead of being divided into separate and independent jurisdictions, might be amalgamated into one. In the evidence which was given before the Committees of the two Houses of Parliament on the East India affairs in 1852-53, strong opinion was expressed by many that it was desirable, with a view to the better administration of justice in India, that *these distinct* judicial systems should be *consolidated* into one, which would *unite the legal knowledge of the English lawyers with the intimate knowledge of the customs, habits and laws of the natives possessed by the Judges of the Sadar Adalats.*

But there were many difficulties in the way of unification of the two rival systems. Many eminent lawyers thought that it would be useless to attempt to unite the two systems till certain forms of procedure were established. There was a great disparity between the forms of procedure used by the two systems and so it was necessary to establish some uniform forms of procedure to be made use of by the newly amalgamated Court. Before, therefore, the actual work of unifying the two parallel judicial systems could be undertaken

1. App. V to the Report on the affairs of the East India, 1832, page 75.

it was imperative to adopt some preliminary steps in order to bridge the wide gulf existing between them.

The first important step in this direction was taken in 1833, when the Charter Act established one Central Legislative Authority in India enjoying very wide powers of legislation. Its authority was to prevail throughout India. Its laws were to be binding on every court of justice whether established by the Charter of the Crown or by the authority of the Company. With this, the relationship between the Supreme Courts and the Indian Legislature underwent a fundamental change. Previously, they were bound by only those Laws of the Indian Legislatures which had been registered with them. After 1833, the Supreme Courts lost their privileged position in this respect. They were henceforth to be bound by every Act of the Indian Legislature along with other Courts in the country.

The year 1833 also initiated the process of codification of the Indian laws. In 1859 the first Civil Procedure Code was enacted. Shortly afterwards, the Code of Criminal Procedure and the Indian Penal Code were made into law by the Indian Legislature.

The stage was now ready for the *union* of the two judicial systems. Following the disastrous events in 1857, the East India Company was dissolved. The Government of the country was directly assumed by the Crown in 1858. All these factors gave a fillip to the move of consolidating the two judicial systems.

Ultimately, in 1861 the British Parliament enacted the Indian High Courts Act which merged the Supreme Courts in the presidency towns with the Sadar Courts and created in their stead new Courts, which were called the High Courts of Judicature.

THE INDIAN HIGH COURTS ACT, 1861

The Indian High Courts Act, passed on 6th August, 1861

was entitled as 'An Act for establishing High Courts of Judicature in India.' Being 24 & 25 Victoria, cap. 104, it was a small piece of legislation consisting of 19 sections in all. Section one vested in Her Majesty *authority* to issue Letters Patent creating High Courts of Judicature at Fort William, Madras and Bombay. Each of these High Courts was to consist of a Chief Justice and puisne Judges, not exceeding fifteen in number at a time. At least one third of these Judges, including the Chief Justice, were to be barristers of not less than five years' standing. Not less than one third of the Judges had to be from amongst those members of the covenanted civil service of not less than ten years' standing who had served as Zilla Judges for at least three years. The remaining quota of Judges could be selected out of the following categories of persons :

(i) Barristers of at least five years' standing :

(ii) Civil servants of at least ten years' standing who had three years work as District Judges to their credit ;

(iii) Persons who had been holding the office of Principal Sadar Ameens or Judges of Small Cause Courts for at least five years ;

(iv) Pleaders of the Sadar Courts or the High Courts of at least ten years' standing.

The Judges of the High Court were to hold office *during Her Majesty's pleasure.* With the establishment of the High Courts in Bengal, Madras and Bombay, the Supreme Courts, the Courts of Sadar Diwani Adalat and the Courts of Sadar Nizamat Adalat were to be abolished.

The 9th section defined the jurisdiction and the powers of the High Court. It was to have and exercise such *civil, criminal, admiralty* and *vice admiralty, testamentary, intestate,* and *matrimonial jurisdiction,* original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it was established, as Her Majesty might grant and direct by Her Letters Patent. Save as otherwise directed by the Letters Patent, the High Court was

also *to enjoy and exercise such jurisdiction, power and authority* as were being exercised by its predecessors immediately before its creation. The High Court was to have superintendence over all the Courts subject to its appellate jurisdiction.

The 16th section of the Act authorised Her Majesty to erect a High Court for such territory as was not included within the local limits of another High Court, if it was deemed necessary. By section 18, the Crown was authorised to transfer any territory from the jurisdiction of one High Court to that of the other and generally to alter and determine the territorial limits of the jurisdiction of the several High Courts.

The Indian High Courts Act, 1861 was a momentous step forward in the direction of improving the administration of law and justice in India. It accomplished the great object, which had long been contemplated, of substituting for the Supreme and Sadar Courts the High Courts of Judicature possessing the combined powers and authorities of the abolished Courts and exercising jurisdiction both over the provinces and the presidency towns. Its advantages were clear. In each Presidency there was going to be established one sole court of appeal instead of three. In as much as the administration of justice in the minor courts depends on the mode in which the appeals sent from them are treated, the High Courts were expected to improve the administration of justice throughout India. The old anachronism of having two independent, coordinate and parallel systems for the administration of justice, working side by side, were to disappear resulting in simplicity and efficiency.

The Supreme Courts consisted entirely of the EnglishLawyers. The Sadar Courts consisted entirely of the civil servants who did not have much legal knowledge. The new High Courts were to consist of both these elements. In this way, the intimate knowledge of the customs, habits and the laws of the Indians possessed by the civil servants was to be united with the legal knowledge and training of the Barrister Judges. The two elements in the Court were expected to help and assist each

other in formulating their opinions. The union of the two classes of Judges was expected to constitute a far better Court than was possible when either of them sat separately. The Chief Justice of the High Court, however, was to be a trained lawyer. It was laid down in the Act itself that *he would be a barrister of at least five years' standing*. Civil servants were not eligible for this office. The new measure greatly improved the administration of justice in India, strengthened the highest court of judicature in each presidency and elevated the character of other courts by placing them under its supervision.

CHARTER FOR CALCUTTA HIGH COURT ISSUED

In pursuance of this Act, a Charter creating the High Court at Calcutta was issued on May 14th, 1862. The Letters Patent were found defective in certain respects. On 28th December, 1865, fresh Letters Patent were issued.

The High Court was constituted into a court of record.

The High Court was to enjoy powers, authority and jurisdiction on the following lines :

1. Civil Jurisdiction :

(a) Ordinary Original Civil Jurisdiction :[1] The High Court was to have ordinary original civil jurisdiction *within such local limits as might be fixed by competent legislative authority for India.* This jurisdiction in effect was on the same lines as was exercised by each of the Supreme Courts of Judicature within the limits of the presidency town.

The High Court was to be entitled to try all cases in the exercise of its ordinary original civil jurisdiction except the cases falling within the cognisance of the Presidency Small Cause Court in which the debt or damage, or value of the property sued for did not exceed one hundred rupees.

(b) Extraordinary Original Civil Jurisdiction : Under this jurisdiction the High Court was authorised

1. In effect this jurisdiction extends only within the limits of the presidency town.

to remove and to try and determine any suit pending in any Court under its superintendence whenever it thought proper to do so, *either on the agreement of the parties, or for the purposes of justice.*

The High Court was thus empowered to call for and try, as a court of first instance, any suit which the law required to be instituted before some other tribunal.

(c) Appellate Civil Jurisdiction : The High Court was authorised to hear appeals from the Civil Courts subordinate to it. This jurisdiction, it may be noted, had been inherited by the High Court from its predecessor—the Court of Sadar Diwani Adalat

(d) The High Court was also to exercise the same power and authority with respect to the persons and estates of infants, idiots, and lunatics as was being exercised by its predecessor, the Supreme Court.

(e) One of the Judges of the High Court was authorised to hold the Court for the relief of insolvent debtors and could exercise such powers and authorities with respect to original and appellate jurisdiction 'as are constituted by the laws relating to insolvent debtors in India.'

(f) In the exercise of its ordinary original civil jurisdiction the High Court was directed to apply the same law or equity as would have been applied by the Supreme Court of Judicature. In the exercise of its extraordinary original civil jurisdiction the High Court was directed to apply such law, equity and rule of good conscience as the local lower Court having jurisdiction in such a case would have applied. In the exercise of its appellate jurisdiction, the High Court was directed to apply such law, equity and the rule of good conscience as the Court in which the proceedings in the case were originally instituted ought to have applied.

2. Criminal Jurisdiction.

(a) Ordinary Original Criminal Jurisdiction : This jurisdiction was to extend within the same local limits as the ordinary original civil jurisdiction. Beyond these limits it extended to all such persons[1] as the Supreme Court of Judicature enjoyed formerly.

(b) Extraordinary Original Criminal Jurisdiction : The High Court was to enjoy this jurisdiction over all persons residing within the jurisdiction of any Court subject to the superintendence of the High Court. The High Court could try any person on charges being preferred by the Advocate General, or by any magistrate or any other officer specially empowered by the Government in that behalf.

(c) Appellate Jurisdiction : The High Court was to be a Court of Appeal from subordinate Criminal Courts. The High Court was also to act as a Court of Reference and Revision from the subordinate Criminal Courts. It might hear and determine all reference made to it by the Sessions Judges. It might revise proceedings of the lower Criminal Courts.

(d) In the discharge of its criminal jurisdiction the High Court was to apply the law as contained in the Penal Code which had already been enacted by the Indian Legislature.

3. Admiralty and Vice-Admiralty Jurisdiction :

The High Court was to enjoy all civil, criminal and maritime jurisdiction, and also jurisdiction to try and adjudicate prize causes and other maritime questions arising in India to the same extent as was being exercised by the late Supreme Court of Judicature as a Court of Admiralty and Vice-Admiralty.

4. Testamentary and Intestate Jurisdiction : The High Court was to have this jurisdiction to the same extent as was

1. i. e. European British subjects.

being enjoyed by the Supreme Court. It could grant probates of wills and letters of administration.

5. Matrimonial Jurisdiction : This jurisdiction of the High Court was to extend only to those persons who professed the Christian religion.

The High Court was authorised to make rules and orders for the purpose of regulating all proceedings in civil cases including proceedings in its Admiralty, Vice Admiralty, Testamentary, Intestate, and Matrimonial Jurisdictions : 'Provided always that the High Court' was to be guided in making such rules and orders 'as far as possible by the provisions of the Code of Civil Procedure of 1859'. In the exercise of its ordinary original criminal jurisdiction the High Court was to follow the same procedure as was followed by its predecessor, the Supreme Court. In all other criminal cases the proceedings were to be regulated by the Code of Criminal Procedure Code enacted by the Indian Legislature in 1861.

The Charter made provisions for regulating appeals to the Privy Council which will be noticed elsewhere.[1]

It was declared that the provisions of the Letters Patent *were subject to the legislative powers* of the Indian Legislature and 'may be in all respects amended and altered thereby.'

OTHER LETTERS PATENT

In pursuance of the Indian High Courts Act 1861, two other High Courts came into existence at Bombay and Madras under the Letters Patent dated 26th June, 1862. They were subsequently replaced by fresh Letters Patent in 1865. These two Charters ran exactly on *similar lines* and were couched in *similar terms* in all respects as the Calcutta Charter. The three High Courts of Calcutta, Bombay and Madras were thus placed on the *same footing*.

SURVIVALS OF THE PAST

The emergence of the High Courts was a very important

1. See Ch. XVII.

event in the process of the evolution of a proper and regular judicature in the country. For over eighty years there had been in existence *two parallel systems* in each of the provinces of Bombay, Madras and Bengal. In 1861 *they were integrated and knit together* under the unified control of the respective High Courts. In view of the past history—unplanned and complicated previous evolution of the two systems—their unification and merger was really an achievement of the first importance.

During the long period of divergent growth and development, the two systems of Courts—Crown's Courts represented by the Supreme Courts and the Company's Courts—had come to differ from each other in many significant respects. They differed in the *law* administered by them and in the *procedure* for the administration of that law. The areas of their respective jurisdictions were *vague* and *ill defined* which necessarily detracted from their efficiency and utility. Besides, there was the important difference of *control*, one set of Courts deriving jurisdiction from, and being under the control of, the Crown and the other set of Courts deriving jurisdiction from the Company, and being under the control of the Local Governments.

It would be wrong to suppose that by the passage of the Indian High Courts Act in 1861 and the consequent establishment of the High Courts, all these differences were obliterated immediately. Some of these differences persisted to more or less extent even after the creation of the High Courts and it was only in course of time that they disappeared.

A careful perusal of the above mentioned summary of the provisions of the Charter would indicate that the ordinary original side of the High Court was the *immediate successor* of the Supreme Court of Judicature; the appellate side, of the Sadar Adalats. The two sets of Courts previously administered different laws; and the creation of the High Court, did not make the law uniform on all its sides. In its ordinary original civil jurisdiction, the High Court was required to administer the same law as was being administered by the

Supreme Court, which was mainly the English Law. On its appellate side in civil cases, the High Court was to apply the same law or equity as the lower Court ought to have applied, which meant the law which the Mofussil Courts applied previous to integration. Though the two independent systems of judiciary had been merged yet a complete *fusion of the two different systems of laws was not effected.* The Secretary of State commented on this part of the Charter as follows :

'The substantive civil law to be administered by the High Court within the jurisdiction of the Supreme Court and Sadar Courts, respectively, will, until otherwise provided, continue as at present. This.....it was no part of the purpose of the Act of Parliament or Charter to effect. And the clauses.....are probably superfluous. But they have been introduced to obviate any apprehension which might have been entertained that in fusing the two Courts together, it was intended to fuse also the law which they have respectively hitherto administered, and thus to make a substantial innovation, not only in the tribunals for the administration of the law but in the law itself.'

The Secretary of State, however, expressed the hope that ere long measures might be taken for effecting great improvements in this respect, by enacting in India '*a body of substantive law*, by which *all classes* shall be governed, and *all transactions* shall be regulated except in cases to which our Judicatures are required to apply the personal laws of any classes of our Indian subjects.' It was only in course of time, with the progress of the process of codification of laws in India and with the enactment of a body of substantive laws, that the *disparity* between the *bodies of laws* administered by the three High Courts on their original sides and their appellate sides *was diminished.* The new codes were to be applicable to all the courts and to that extent uniformity of laws was achieved.

In the realm of procedure, uniformity was achieved with the fusion of Courts. The Code of Civil Procedure and

the Code of Criminal Procedure[1] were applicable to the High Courts and all the Courts working in the land.

The establishment of the High Courts did away with the duality of control of Courts. In each of the provinces of Bombay, Bengal and Madras all the Courts fell under the unified control of the respective High Courts. The emergence of the High Courts also did away with the major evils arising out of a clash of jurisdictions between two parallel judicial systems. *Harmony* was established between them and this was a major achievement.

OTHER HIGH COURTS—ALLAHABAD

The Indian High Courts Act, 1861 had envisaged the creation of other High Courts in India besides the three High Courts in the presidencies. Section 16 of the Act had authorised the Crown to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in India, not included within the local jurisdiction of another High Court.

Use was made of this clause by issuing on 17th March, 1866, a Charter establishing a High Court at Agra for the North Western Provinces. This High Court was shifted to Allahabad in 1875 and then it came to be known as the High Court of Judicature at Allahabad. The constitution, jurisdiction, powers and privileges of the Allahabad High Court were very much similar to those of the Presidency High Courts except for the following points of difference :

1. The High Court at Allahabad did not enjoy any *ordinary original civil jurisdiction.* It only had extraordinary original and appellate civil jurisdiction.

2. The High Court at Allahabad did not enjoy any Admiralty or Vice-Admiralty jurisdiction.

On July 26, 1948 the territorial jurisdiction of the High

1. Originally the Cr. P. C. did not apply on the ordinary original criminal side of the High Court. But later it was made applicable throughout.

Court was augumented by the amalgamation of the Oudh Chief Court with it.

THE PATNA HIGH COURT

In 1912, the territories of Bihar and Orissa, which had previously formed part of the Province of Bengal, were constituted into a distinct province. On 9th February, 1916 Letters Patent establishing a High Court in this new province were issued and thus the High Court of Judicature at Patna came into existence.

The High Court at Patna was to stand on the same level as the Allahabad High Court. In one respect, however, it differed from that High Court and corresponded to the High Court at Calcutta. The High Court at Allahabad did not enjoy any Admiralty jurisdiction. The Patna High Court, on the other hand, was to have the same Admiralty jurisdiction as was exercisable by the High Court of Fort William.[1]

THE LAHORE HIGH COURT

The High Court of Lahore came into existence by virtue of the Letters Patent issued on 21st March, 1919. It was to have jurisdiction over the provinces of Punjab and Delhi. At the time of the issue of these Letters Patent there existed the Chief Court of Punjab which was established by an Act of the Indian Legislature.[2] This Chief Court was raised to the status of the High Court. In all material respects, the High Court at Lahore corresponded to that at Allahabad.

THE HIGH COURT AT NAGPUR

The High Court at Nagpur was established by the Letters Patent issued by George V on 2nd January, 1936. There was a Court of the Judicial Commissioner[3] in the Central Provinces working on the eve of the establishment of the High Court at Nagpur. The jurisdiction, powers and privileges of

1. See Letters Patent Patna H.C. Cl. 24.
2. Act No. XXIII of 1865
3. The Court was established by Act No. XIV of 1865.

this High Court were on the same lines as those of the High Court at Allahabad.

HIGH COURTS UNDER THE GOVERNMENT OF INDIA ACT, 1935

In 1935, the British Parliament enacted the Government of India Act which remodelled the Constitution of the whole country on federal lines. Certain provisions were made to regulate the composition and constitution of the High Courts, whose position under the Act was as follows :

1. From the very beginning, the Judges of the Supreme Courts and then the Judges of the High Courts used to hold office during His Majesty's pleasure. This provision was expressly laid down in the Indian High Courts Act of 1861. It was *repeated* in the Government of India Act 1915.

In England it is a very well established principle of the Constitutional Law that the Judiciary should be *independent* of the Executive. A Judge cannot be removed from his office by His Majesty except only on an address by both the Houses of Parliament to that effect.[1] In India this principle was never laid down in so many words. Technically, a Judge of the High Court could be removed by His Majesty at any time the Crown liked for the Judge held office during His Majesty's pleasure. The Judiciary would have become completely subservient to the Executive had not the Government scrupulously observed the principle of *judicial independence in spirit.* Though not in law, yet in convention, the principle of judicial independence was observed in India.

The Government of India Act, 1935 effected a change in this respect. The convention of judicial independence was given a legal tenor. It was thus laid down that a Judge of the High Court *would hold office up to the age of sixty years.* He, however, could be removed earlier by His Majesty on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on a reference being made to them by His Majesty, reported that the Judge ought to

1. This rule became established as a result of the Act of Settlement enacted in England in 1701.

be removed on any such ground. The Judges of the High Court thus got a *security of tenure* in words as well as in essence.[1]

2. Since their inception the High Courts in India had to contain one third of the Barrister Judges and one third of the Civil Service Judges. This rule was specified in the Indian High Courts Act, 1861 as also in the Government of India Act, 1915. The rule was found to be inconvenient and so the Government of India Act, 1935 dropped the rule fixing the percentage of the various categories of Judges.

3. The Indian public opinion did not view with favour the appointment of the servicemen as Judges of the High Court. In their earlier career, these persons acted as executive officers and so they developed a pro-executive outlook. They could not shed their bias in favour of the executive even when they were called upon to act as Judges. In England, Judges are recruited from the Bar and no civil servant ever sits as a Judge. The Indianpublic, therefore, wanted that servicemen should cease to be appointed as Judges of the High Courts. The British Government, however, did not accept this view and the civil servants continued to be appointed Judges even after 1935.

4. The Indian High Courts Act, 1861 had laid down that the Chief Judge of the High Court should always be a *Barrister*. After 1915, the Chief Justice had to be a Barrister or *an Advocate*. No civil service Judge could ever be the Chief Justice of a High Court. This was regarded as an *anomaly* and so the Government of India Act, 1935 dropped this provision. Thereafter, members of the civil service also became eligible for the office of the Chief Justice.

5. To settle the quarrels between the Supreme Court at Calcutta, on the one hand, and the Government and the Company's Courts, on the other, all revenue matters were excluded from the purview of the Supreme Court by the Act of Settlement of 1781.[2] This was necessary to prevent the continued

1. Section, 220 (2).
2. See page 113.

clash of jurisdictions between the two rival sets of Courts. Similar restrictions had been incorporated in the constitution of the other Supreme Courts whenever they were created. Such a restriction was *omitted* from the High Courts Act of 1861. But, curiously enough, the Government of India Act, 1915, for no apparent reasons, re-imposed the same old restriction on the jurisdiction of the three High Courts.[1] Section 106 (2) laid down: 'The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue....'

Revenue matters were thus excluded from the original jurisdiction of the High Courts. Only the three High Courts of Bengal, Bombay and Madras had original jurisdiction. The result of the provision was that though these High Courts *might adjudicate a matter relating to revenue on their appellate side, they could not do so on their original side.* This was an absurd anachronism which was again imported in 1915 after it had been in suspension for over half a century. There was no rhyme or reason in prohibiting the original side of the High Courts from trying the revenue cases when they could do so on the appellate side. The restriction had come to birth in 1781 when there was a conflict of jurisdictions between the Sadar Adalat and the Supreme Court at Fort William. The conflict, in course of time, utterly vanished and there was no justification for preserving this *antiquated fossil* on the statute book. The provision was anomalous and useless in the context of the altered circumstances.

The Government of India Act, 1935, however, again failed to remove this anachronism. It gave it a new lease of life when in section 226 it enacted that no High Court should have any original jurisdiction in any matter concerning the revenue..

6. The High Courts were placed by the Act of 1935 under the administrative control of the Provincial Governments but adequate care was taken to *safeguard their independence.* The Government of India Act, 1935 thus laid down

1. The High Courts at Calcutta, Madras and Bombay.

that the expenses of a High Court would be charged to the revenue of the Province. The Governor was to exercise his individual judgment in assessing the expenditure of the High Court and the Provincial Legislature was not authorised to reduce or curtail the expenses of the High Court. The Court was thus made immune from interference by the Local Legislature or the Executive.

The Government of India Act, 1935 thus conferred a very dignified status on the High Courts. Their independence was adequately safeguarded and assured. The framers of the Act had taken adequate care to see that the High Courts were in a position to discharge their judicial functions without fear or favour.

EAST PUNJAB, ASSAM AND ORISSA HIGH COURTS

As a result of the partition of the country, the High Court of Lahore was lost to India. To cater to the needs of the State of East Punjab, a separate High Court was erected in 1947[1] practically on the same lines as the erstwhile High Court at Lahore.

The year 1948 saw the creation of two more High Courts, one each in the States of Orissa and Assam. The respective orders were issued by the Governor General.[2]

Each of the States of parts A and B has a distinct High Court of its own. Some part C States have the Courts of Judicial Commissioners (which have the status of a High Court) Some part States, like Delhi and Coorg, fall under the jurisdiction of the High Courts in the adjoining States.

Immediately before the establishment of these two High Courts, the territories of Assam and Orissa were under the jurisdiction of the High Court at Calcutta and the High Court at Patna respectively. The new High Courts were to exercise the same jurisdiction as the High Courts of Calcutta and Patna exercised in those territories previously.

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1. The High Courts (Punjab) order, 1947.
2. The Assam H. C. order 1948, the Orissa H. C. Order 1948.

With the establishment of the two High Courts in 1948, each part A State came to have a separte High Court of its own.

THE HIGH COURTS UNDER THE NEW CONSTITUTION

The Constitution of the Republic of India makes a number of provisions in relation to the High Courts in the country. Some of the important ones are as follows :

1. There is to be a High Court for each State.

Each of the State of Parts A and B has a distinct High Court of its own. Some Part C States have the Courts of the Judicial Commissioners (which have the status of a High Court). Some Part C States like Delhi and Coorg fall uuder the jurisdiction of the High Courts in the adjoining States. Art. 225 of the Constitution continues in force the jurisdiction of, and the law administered in, any existing High Court subject to the provisions of the constitution. The tenor of Art. 372 is also the same.

However, any restriction on the original jurisdiction of any High Court with respect to any matter concerning revenue or concerning any act ordered or done in the collection thereof which existed before the inauguration of the new Constitution, has now been abolished. (Art. 225).

2. Each High Court is to be a court of record having the power to punish for contempt of itself. (Art 215)

3. The Judges of a High Court are to be appointed by the President after consulting the Chief Justice of India, the Governor of the State to which the High Court belongs, and the Chief Justice of the High Court to which the appointment is to be made. (Art. 217).

4. A person to be eligible for appointment to a High Court as Judge must fulfil the following qualifications : (Art. 217).

(i) He must be a citizen of India ;

(ii) He must have held a judicial office in India for at

least ten years or must have been an advocate of a High Court for at least ten years.

On a comparison of this provision with the corresponding section 220(3) of the Government of India Act, 1935, which prescribed the qualifications for this office formerly, it will be noted that :

(i) The Barristers of the United Kingdom are not entitled *ipso facto* to be appointed to the High Court. They can be so appointed only when they have been practising in a High Court for at least ten years.

(ii) The period of judicial service which now qualifies a person for appointment as a High Court Judge has been raised. Previously it was only five years. Now it is ten years.

(iii) The members of the civil service can be appointed as Judges of a High Court only when they have held a judicial office for at least ten years. Previously they became eligible for this office after having held the office of a District Judge for three years.

5. Many provisions have been made to render the High Courts *independent* of the Executive and also to enable them to discharge their judicial functions without fear or favour. The Constitution prohibits discussion, in the Parliament or the State Legislature, with respect to the conduct of any Judge of a High Court in the discharge of his duties, except on a motion in the Parliament for presenting an address to the President praying for the removal of the Judge. (Arts. 121 and 211).[1]

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1. In some Part C. States there are courts of the Judicial Commissioners. Bhopal and Vindhya Pradesh had one under 'The Bhopal and Vindhya Pradesh (Courts) Act 1950'. The State of Coorg falls under the jurisdiction of the Madras High Court. The State of Himachal Pradesh came to have a court of the judicial Commissioner in 1948 under 'The Himachal Pradesh (Court) order', made by the Central Government. In 1948 a Court of the Judicial Commissioner was established in Kutch under 'The Kutch (Courts) order 1948.

A Court of the Judicial Commissioner has the same status as a High Court.

The High Court Judges have been guaranteed a *security of tenure.* They may hold their office till they reach the age of sixty years. A Judge of a High Court *cannot be removed* from his office except by an order of the President passed after an address by each House of Parliament, supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House and voting, has been presented to the President, in the same session, for such removal on the ground of *proved* misbehaviour or incapacity. (Arts. 217 & 124(4).

The salaries to be paid to the Judges of the High Courts have been specified in the second schedule of the Constitution. They cannot be varied unless the Constitution is amended.

Besides the salary, a Judge of a High Court is entitled to certain allowances and rights which may be varied by the Parliament. The Constitution *forbids any change* in the allowances or rights to the *disadvantage* of a Judge during his tenure of office. Security of tenure and financial security are the two essential ingredients of an independent and efficient judicial system. The new Constitution seeks to ensure both these safeguards to the High Court Judges. (Art. 221).

The administrative expenses of a High Court are *charged upon* the Consolidated Fund of the State. [Art. 229(3)].

6. The Constitution effected certain changes in the jurisdiction of the High Courts. Firstly, the restriction on the original jurisdiction of the High Courts in relation to matters arising out of revenues was done away with.

Secondly, Article 226(1) has made a conspicuous innovation by authorising every High Court to issue 'directions, orders or writs, including writs in the nature of *habeas corpus mandamus, prohibition, quo warranto* and *certiorari*' for the enforcement of *fundamental rights or for any other purpose.* This is a *remarkable* enhancement in the powers of the High Courts and the great importance of this provision becomes

apparent as soon as it is viewed in the light of the circumstances existing immediately before the inauguration of the new Constitution.

From the point of view of their writ issuing power before the new Constitution, the High Courts could be put into *two* groups. Group first consisted of all the High Courts except those of Calcutta, Madras and Bombay. The High Courts in Group I did not possess any authority to issue any prerogative writ except an order in the nature of the writ of *habeas corpus* under the provisions of section 491 of the Criminal Procedure Code of 1898.

The three High Courts of Calcutta, Madras and Bombay constituted a group by themselves. These High Courts were the inheritors of, and the successors to the jurisdiction of the Supreme Courts at Calcutta, Madras and Bombay respectively. Certain provisions in the Charters of the Supreme Courts gave them such jurisdiction and authority as the Justices of the Court of King's Bench had by Common Law in England. The Court of King's Bench could issue the prerogative writs and so the Supreme Courts in India could also issue the prerogative writs. Naturally, the three High Courts of Calcutta, Madras and Bombay secured these powers and became entitled to issue the prerogative writs within the *same ambit* as the Supreme Courts could have done.

But this ambit was obscure and vague. The most important question that often arose was whether these High Courts could issue any prerogative writ outside the limits of their ordinary original civil jurisdiction. The territorial extent of the ordinary original civil jurisdiction of the Presidency High Courts was limited to the boundaries of the presidency towns as their predecessors, the Supreme Courts, enjoyed jurisdiction only within those limits. There was no difficulty in the way of these High Courts being able to issue the prerogative writs within the ambit of their ordinary civil jurisdiction. But, the other question, regarding their capacity to issue the writs beyond those limits, bristled with difficulties. In the

beginning some opinions were expressed that the High Courts could issue the writs even outside the limits of their ordinary original civil jurisdiction. But in course of time it came to be held by the High Courts as well as by the Privy Council that their inherent power in this respect did not entitle them to issue the writs beyond the limits of the presidency towns. The basis for this view was simple. The High Courts derived their authority from the Supreme Courts. The Supreme Courts' jurisdiction was *limited territorially* to presidency towns. They could not issue a writ beyond those limits except in special cases when the party to whom the writ was being issued happened to be a British subject or a Company's servant who was personally liable to the Courts' jurisdiction. The High Courts, therefore, could not issue a writ when the Supreme Courts themselves could not have done so.

In the famous case of Ryots of Garabandho v Zemindar of Parlakimedi[1], the Judicial Committee of the Privy Council held that the High Court of Madras could not issue *certiorari* outside the limits of the Madras town. Similarly in Hamid Hasan v Banwari Lal[2] the Privy Council held that the High Court at Calcutta was not entitled to issue *quo warranto* outside Calcutta.

The three High Courts at Calcutta, Madras and Bombay, therefore, could issue prerogative writs within the limits of their ordinary original civil jurisdiction *but* not *beyond*. Their jurisdiction to issue a writ of mandamus was defined by the Specific Relief Act vide section 45 which authorised the three High Courts to issue *mandamus* within the local limits of their ordinary original civil juridiction to a public officer, a corporation or an inferior court of justice. Section 491 of the Criminal Procedure Code defined more specifically their power to issue orders in the nature of *habeas corpus*.

Section 50 of the Specific Relief Act prohibited all other High Courts from issuing the writ of *mandamus*.

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1. 70 I. A. 129
2. 51 C. W. N. 716.

The position of the High Courts on the eve of the inauguration of the new Constitution, from the point of view of authority to issue prerogative writs, could thus be summarised as follows :

(i) The High Courts of Calcutta, Madras and Bombay could issue the prerogative writs within the local limits of the presidency town or rather within the area of their ordinary original civil jurisdiction. Though their appellate and extraordinary jurisdiction extended beyond these limits, they could not issue the writs in that area beyond the ordinary riginal civil jurisdiction ;

(ii) Under section 491 Criminal Procedure Code they could issue *habeas corpus* beyond the local limits of the ordi- nary original civil jurisdiction ;

(iii) Other High Court could not issue any prerogative writ except the Habeas Corpus, authority for which had been conferred on them by section 491 of the Criminal Procedure Code.

In this way, the High Courts, before the new Constitution, did not enjoy *co-equal authority* to issue *writs.* Mainly on historical grounds, there were artificial and invidious distinctions between them. The inhabitants of the presidency towns enjoyed a privilege which their brethren outside the presidency towns did not enjoy. The Constituent Assembly of India did not like to maintain such an unreasonable distinction. Moreover, these prerogative writs were regarded as being among the *greatest safeguards* that the British Judicial System had designed for upholding the rights and liberties of the people. It was, therefore, necessary to incorporate these writs in the Constitution. The Constitution treated all the High Courts alike by laying down a *uniform policy.* The intention and policy, of the Constituent Assembly clearly was that the High Court in every State should hold throughout its territorial jurisdiction the position of the '*aula regis*' or '*custos morum*' as the King's Bench did throughout England. In order to implement this policy *all the High Courts were authorised to issue the*

prerogative writs within the whole of their territorial jurisdiction. This was indeed a *fundamental* change. The High Courts, which did not have such a power before, got it under the new Constitution. The three Presidency High Courts were authorised to issue the writs not only within their ordinary original civil jurisdiction but *within the whole* of their territorial jurisdiction.

The language used in Article 226 of the Constitution is of the *widest possible significance.* There is no restriction of any kind on the writ issuing powers of the High Court to-day. The High Court may issue an *order, direction* or a *writ* including *writs* in the nature of the *habeas corpus, mandamus prohibition, quo warranto* and *certiorari for any purpose.* The power entrusted to the High Court is a very large one. It will have to be exercised according to established legal principles, which, it is hoped, are bound to be laid down through the decisions of the Supreme Court and the High Courts. There is no doubt that this power would enable the High Courts to provide effective and quick remedy in cases of importance. It will be a real safeguard for upholding the *liberties, rights* and *freedoms* of the Indian people.

7. Article 227 is another very important provision which greatly enhances the powers of the High Court. *'Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.'* The powers of superintendence of the High Court do not extend only to the Courts but also to all judicial or quasi-judicial bodies within its territorial limits. The word 'tribunal' means person or a body, other than a court, set up by the State for deciding rights between contending parties in accordance with rules having the force of law and, doing so, not by way of taking executive action but of determining a question. All agencies whether Courts or not, performing the duty of deciding disputed questions of right between parties, on behalf of and under the sanction of the State and, in accordance with

the State made laws, are placed under the control of the High Courts.[1]

Even if the judgment or order of the Court or tribunal functioning within the territorial limits of jurisdiction of the High Court is made final by statute and even if the Court or tribunal is not itself subject to the appellate jurisdiction of the High Court, its judgments and orders may be interfered with by the High Court in the exercise of its powers of superintendence. The powers of the High Court extend to both *judicial* as well as *administrative* matters.

The powers of superintendence being very wide are to be exercised by the High Courts *sparingly and with caution*. They have a discretion in the matter. It is an extraordinary and special kind of power. For *ordinary cases* the *normal remedies* under the municipal laws are available and it is only reasonable to suppose that Article 227 leaves this field *untouched* and does not *abrogate* it. So, in cases, where the normal judicial procedure affords an adequate remedy, the High Court would not invoke its powers under 227. Only, therefore, where *grave injustice* has occurred or is likely to occur by reason of some mistake committed by the Court or tribunal and the municipal law provides no adequate remedy, the High Courts are entitled—and indeed bound—to intervene under Article 227 and correct the mistake and grant appropriate relief.[2] Where again, gross violation of some statutory provision has been made by the tribunal and against such violation the law does not provide any adequate remedy, the High Courts would *interfere* in appropriate cases.

Though the exact principles on which the High Courts will act in discharge of their authority under Article 227 have not yet been *very clearly* laid down, and though at the present moment there is a great variation of judicial opinion in this respect, yet, it may be said generally that the High Courts would interfere where justice clearly demands interference, and

1. Haripada v. Anant 56 c. w. n. 124.
2. ibid

where there is no other way of securing justice. The High Courts by virtue of their power of superintendence would see that the courts do what their duty requires them to do, that they do it in a legal manner and that they keep within the bounds of their jurisdiction. The High Courts would interfere in case of dereliction of duty, obvious miscarriage of justice or absence, where there has been a gross excess or abuse of jurisdiction by courts and tribunals.

Undoubtedly, the Constitution confers very *significant* powers on the High Courts by which they would be enabled to promote even-handed and impartial justice. The High Courts may take prompt action when there has been some miscarriage of justice. They have also secured very effective powers to safeguard the individual's legal rights and liberties. The High Courts thus occupy a high position of respect, dignity and authority in the judicial system of India.

CHAPTER XVII

APPEALS TO THE PRIVY COUNCIL—THE FEDERAL COURT—THE SUPREME COURT

BASIS OF THE PRIVY COUNCIL'S JURISDICTION

After the Norman conquest of England, the King in Council came to be regarded as the Court of the last resort throughout his realm in case of default of justice in the lower courts. The King was regarded as the *fountain of justice* throughout his dominions and exercised jurisdiction in his Council which acted in an advisory capacity to the Crown. In course of time, this *supreme* judicial authority to correct the errors in law of the lower courts, so far as it related to England, came to be exercised by the King in Parliament, which came to mean the House of Lords. The House of Lords, became the final Court of Appeal in relation to the Courts of England. For the British Dominions beyond England, the judicial powers in the last resort as the ultimate Court of Appeal, however, continued to be exercised by the King in Council. Initially very minor, in course of time—as the great Colonies and plantations were founded from the 17th century onwards—the judicial functions of the King in Council or the Privy Council assumed a capital importance. The Privy Council—or as it later came to be known, the Judicial Committee of the Privy Council—acted as the highest Court of Appeal from the Courts in India for a very long time, and as such this institution occupies a unique place in the Indian Legal History.

The jurisdiction of the King in Council to entertain appeals from the Courts in the King's Dominions is based, basically, on the Royal Prerogative of the Sovereign as the *fountain of justice*. This prerogative was described long ago in Reg. v. Bertrand[1] as '*the inherent prerogative right and, on all proper occasions,* the duty of the Queen in Council *to exercise an appellate jurisdiction* with a view not only to ensure,

1. L. R. I. P, C. 520.

as far as may be, the due administration of justice in the individual case but also to preserve the due course of procedure generally'.

In early days it was to the King that any subject, who had failed to get justice in the King's ordinary Court, brought his petition for redress. As time went on, such petitions, in relation to the causes dealt with in the English Courts, came to be brought before the King in Parliament, and thus originated the modern judicial functions of the House of Lords. From the Courts in the overseas Dominions, however, the petitions continued to go to the King in Council. It was recognised from the very outset of colonial development that the subject had a right to appeal to the King in Council to seek redress for defects or miscarriage of justice perpetrated in the overseas courts. The King enjoyed a prerogative right to hear appeals from any Colonial Court. *It was this constitutional principle which lay at the basis of the exercise of appellate jurisdiction by the Privy Council from the Courts overseas.*

The practice of invoking the exercise of the Royal Prerogative by way of appeal from any Court in His Majesty's Dominions, in its origin, depended on a mere *petitory appeal* to the Sovereign as the *fountain of justice* for protection against an unjust administration of justice and law. To begin with, petition to the King in Council, was taken into consideration only as a matter of *grace*. It was within the discretion of the King in Council to grant or refuse leave to appeal. With the settlement of Canada and the creation of the Indian Empire, however, it usually became the practice to make provisions allowing appeals to the King in Council under certain circumstances from the Courts there. The former petitory appeal thus ripened into a *privilege* for the King's subjects. Appeals made under these provisions came to be designated as '*Appeals as of Right*'. These Provisions, however, did not exhaust the whole of the Royal Prerogative. Appeals could still be brought before the King's Council with special permission, even though they did not fulfil the provisions expressly

made in that behalf. These Appeals came to be designated as '*Appeals by special leave.*'[1]

RIGHT OF APPEAL FROM INDIA

The first occasion, when a right to appeal to the King in Council from the judgments, decrees of the Courts in India was granted, was in 1726. The Judicial Charter issued then to the Company by George I to establish three Mayors' Courts, in the three presidency towns of Calcutta, Bombay and Madras[2] granted a right of appeal to the Sovereign in Council from the judgments of these Courts. Appeals from the Mayor's Court, in the first instance, lay to the Governor and Council of the Presidency. The decisions of the Governor and Council were to be *final* in all those cases where the value of the subject matter involved did not exceed 1000 pagodas. In all other cases, a further appeal from the Governor and Council to the King in Council was allowed.[3]

The Mayor's Court at Calcutta gave place to the Supreme Court of Judicature in 1774. The Regulating Act reserved a right of appeal to His Majesty in Council from the judgments of the Supreme Court, the 18th section of the Act enacting that any person thinking himself aggrieved by any judgment or determination of the Supreme Court of Judicature at Bengal, should and might appeal from such judgment or determination to His Majesty in Council, 'within such time, in such manner and in such cases, and on such security, as His Majesty, in his said Charter, shall judge proper and reasonable to be appointed and prescribed'[4].

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1. Appeals to the King in Council thus came to be of two kinds :

   (1) Appeals as of Right, lying under the conditions prescribed in this behalf by the Royal Charter, or the Local Legislature of the Dominion, Settlement or the Colony.

   (2) Appeals by special leave of the King in Council in cases lying outside the conditions or limitations that were prescribed. These were appeals in virtue of the King's prerogative.

2. See page 38
3. See page 38
4. See page 76

The Charter of Justice establishing the Supreme Court of Judicature at Fort William, by 30th clause made provisions subject to which the suitors could exercise the *Right of Appeal* to the Sovereign in Council in civil cases. The party wishing to appeal had to present a petition to the Supreme Court praying for leave to appeal to His Majesty in the Privy Council. The Supreme Court was directed not to allow any such appeal unless the petition for that purpose was preferred before it within six months from the day of pronouncing the judgment, *and unless the value of the subject matter in dispute 'shall exceed the sum of one thousand pagodas'*[1].

By 32nd clause of the Charter, the Supreme Court was to have *full and absolute* power and authority to allow or deny appeal in all matters of criminal causes whatsoever, and to 'regulate the terms, upon which such appeals shall be allowed, in such cases in which the said Supreme Court of Judicature, at Fort William in Bengal, may think fit to allow such appeals'.

Apart from these provisions, the Sovereign in Council reserved to himself, full power and authority, 'upon the humble petition of any persons aggrieved by a judgment, decree or decretal or other order or rule of the said Supreme Court of Judicature at Fort William in Bengal, to refuse or admit his, her, or their appeal therefrom, upon such terms, and under such limitations, restrictions and regulations, as we or they shall think fit, and to reform, correct or vary such judgment, decree or orders as to us or them shall seem meet'. This provision reserved to the Sovereign in Council authority to grant *special leave* to appeal in those cases which did not fall within the above mentioned provisions, and where, therefore, no appeal could lie as *a matter of right*.

The Mayors' Courts at Madras and Bombay gave place to the Recorders' Courts in 1797. Provisions analogous to those prevailing at Calcutta were made for regulating appeals from the Recorders' Courts to the King in Council.

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1. See page—82

In 1800, the Recorder's Court at Madras gave place to the Supreme Court of Judicature. The Charter of the Court provided for a right of appeal to the King in Council. The provisions regulating such appeals were similar to those contained in the Charter of the Supreme Court at Fort William. An appeal could be allowed only when the value of the subject matter *exceeded* 1000 *pagodas*.

The Recorder's Court at Bombay gave place to the Supreme Court in 1823. The Charter of that Court again provided for a right of appeal to the Sovereign in Council, *practically* on the same terms as in the case of the Supreme Court at Calcutta, the only difference, however, being that in case of Bombay the value of the subject matter involved in the dispute was to exceed 3000 *Bombay rupees*, instead of 1000 pagodas. Like Bengal, both the Charters of Madras and Bombay, reserved to the Sovereign in Council a right upon the petition of any person aggrieved by any decision of the Supreme Courts, to refuse or admit the appeal, and to reform, correct, or vary such decision according to the Royal pleasure.

In this way, appeals from the three Supreme Courts of Judicature in India could go to the King in Council more or less under similar conditions.

APPEALS FROM THE COMPANY'S COURTS

Apart from the Supreme Court, there used to be the Sadar Diwani Adalat in Bengal. As Company's Court, it used to hear appeals in civil causes from the Company's Courts in the mofussil of Bengal, Bihar and Orissa. It was composed of the Governor General and members of the Council as Judges. In the beginning, the decisions of this Court were final. In 1781, however, the Act of Settlement enhanced its status by constituting it into a Court of Record to hear and decide all pleas and appeals from the Diwani Adalats of the Company. A right of appeal from the decisions of the Sadar Adalat to the Sovereign in Council was also provided for, in civil suits only, where the value of the subject matter in dispute exceeded £ 5000.

The Act of Settlement, besides prescribing the monetary limit beyond which only appeals from the Court of Sadar Diwani Adalat could go, had not prescribed any further rules to regulate such appeals. It was thought to be requisite to establish such rules, as well for the guidance and information of the parties who might be desirous to appeal from the decrees of the Sadar Diwani Adalat to the King in Council, as also for the guidance of the Sadar Court itself in receiving and forwarding the appeals presented to them under the authority of the Act of 1781. With this in view, the Governor General in Council enacted Regulation XVI of 1797, to lay down certain rules to govern appeals to the Privy Council. The Regulation laid down that the petition of appeal was to be presented to the Sadar Diwani Adalat, within six months from the date on which the judgment appealed against had been delivered. The value of the subject matter was to be £ 5000 or above, exclusive of costs of suit. The value of the £ sterling was to be computed at the rate of 10 current rupees. The appealable monetary limit, therefore, was to be Rs. 50,000 or above. Nothing in the Regulation was to be understood to bar the full and unqualified exercise of His Majesty's pleasure upon all appeals to him from the decisions of the Sadar Diwani Adalat, 'either in rejecting any he may consider inadmissible under the statute respecting such appeals, or in receiving any he may judge admissible, notwithstanding the provisions made in this Regulation.'

In 1802, the Sadar Diwani Adalat came to be established in Madras also. The Adalat was to consist of the Governor and Council. From its decisions in civil suits of the value of 45,000 rupees and upwards an appeal lay to the Governor General in Council at Calcutta. In 1818 the Governor General in Council relinquished the authority to hear appeals from the Sadar Diwani Adalat at Madras. Provisions were then made for the appeals from the Madras Sadar Diwani Adalat to go to the King in Council, and rules similar to those contained in the Bengal Regulation 16 of 1797 were framed for the conduct of such appeals. These rules were published by

the Madras Regulation VIII of 1818. The one peculiar feature of this Regulation was the absence of any restriction as to the appealable amount. Accordingly, in many cases, the appeals from the Madras Sadar Adalat were for sums below £ 5000.

In the case of Bombay the right of appeal was allowed as early as 1812. A Regulation passed in that year enacted the rules for regulating appeals from the Bombay Court of Sadar Diwani Adalat to His Majesty in Council, in suits of the value of £ 5000, exclusive of costs. The Regulation of 1812, however, was modified by Regulation V of 1818 of the Bombay Code. The latter Regulation provided for the reception and transmission of appeals from the Court of Sadar Diwani Adalat to His Majesty in Council. Certain rules for this purpose, mainly similar to those made at Bengal, were enacted. One conspicuous omission in these rules was the absence of an appealable amount for the purpose of appeals to the King in Council. In the year 1827, the new Code of Bombay Regulations, known as the Elphinstone Code—came into force. The Code laid down fresh provisions for appeals from the judgments of the Sadar Diwani Adalat. These provisions, in effect, were the same as those already in force. Again, the restriction as to value of the subject matter in dispute beyond which only such appeals were to be allowed, was most unaccountably omitted. From 1818, there was no restriction in this respect, and the result was that a large number of appeals were forwarded to His Majesty in Council from Bombay, involving trivial amounts and this became a source of great inconvenience, grievance and hardship to the respondents.

In all the Presidencies the respective Regulations had reserved the Sovereign's right to reject or receive all appeals, notwithstanding any provisions contained in these Regulations. In this way, there were *two kinds of appeals* from the Courts of Sadar Diwani Adalat in the three Presidencies : Appeals to the Privy Council *as a matter of right*, when conditions laid down in the Regulations were fulfilled; Appeals to the Privy Council *by its special leave* in all other cases.

FATE OF EARLY APPEALS

To start with, the Indians could not make much use of the provisions for appeals to the King in Council. They were ignorant of the steps necessary to be taken to bring an appeal before the Privy Council. The Indians *had very slight intercourse* with the Europeans and so they could not profitably or extensively apply the enactments relating to appeals.[1]

The appellants from the decisions of the Supreme Courts, however, did not labour under any of these disadvantages or handicaps. In the case of the Supreme Courts, rules for appeals to His Majesty in Council had been laid down in their Charters of Justice. The Courts themselves had made some additional rules and orders in this behalf. Persons coming to the Supreme Courts in quest of justice usually were in the habit of close intercourse with the Europeans. From the very first, the Supreme Courts were looked upon as the off-shoots of the Courts in England. The suits in them were carried on by the English Counsels and Attornies. The proceedings and the procedure of these Courts resembled those in England. It was thus very easy for a suitor in the Supreme Court to appeal to the King in Council and pursue the appeal in England. An Attorney, who helped him in pursuing his suit at the Supreme Court in India, would appoint a solicitor in England in case of appeal, and under his management the appeal before the Sovereign in Council could be conducted. On the other hand, both the suitors and practitioners in the Courts of the Company, were very little acquainted with the mode and manner and procedure of conducting appeals in England. The suitors in the Company's Courts were mostly native residents in the interior of the country, and though persons of rank and wealth, they had very little intercourse with the Europeans. They were conversant, if at all, only with their own respective personal laws and the Regulations enacted by the Government of the Company. These persons had no idea of the constitution, laws and procedure of the English

1. Morley's Digest, I, cxxii.

Courts. With the result that either they shrank from the attempt to go in appeal to His Majesty in Council, or, out of total ignorance regarding the requisite steps to be taken to pursue the appeals, failed to continue the proceedings. In all cases of appeal from the Supreme Court, papers were obtained by the Attorney who conducted the case in India, and forwarded by him to an agent in England. The Attorney of the Supreme Court was thus *a connecting link* between the appellant and the Privy Council. No such connecting link existed in the case of appellants from the Sadar Diwani Adalats. The transcript records were prepared by the Government and transmitted to England. The vakeels who helped the parties in India were of no further use in case of appeals to the King in Council. They did not know the steps that were necessary to be taken. In consequence, the appeals stood still. The parties in India, on their own part, having conformed strictly to the Regulations regulating the procedure for making appeals to the Privy Council, and after the necessary papers had been transmitted to England, thought that decision would come from England in due course of time, without anything else being done by them. They thought that the Court of the Sovereign in Council would take the case into consideration and return the decision there on, without their doing anything else in the matter.

Such expectations were aroused in the minds of the Indians by the practice obtaining in cases of appeals from the Madras Sadar Diwani Adalat to the Governor General in Council at Calcutta. As noted earlier, up to the year 1818, appeals from the Madras Sadar Adalat lay to the Governor General in Council at Calcutta. According to the procedure, when documents, properly attested were sent to Calcutta, the decree was in due course of time received at Madras, confirming, reversing or varying the decree of the Adalat, without the parties being required to do anything further in this behalf. Accordingly, when appeals were transmitted to England, the parties patiently waited for the decision at the hands of the Privy Council, but invain. The procedure in

England, however, was different from what the Governor General in Council had actually followed. Parties waited for long, and no decision arrived in India. In many cases the property in dispute was eaten up by private or public debts. The litigants were ruined and impoverished. The ignorance of the procedure made the right of appeal from Sadar Courts in India to the King in Council a source of harm instead of good. The Parties at the time of transmitting appeals to England had to make deposits. Tired of waiting for long, the parties compromised their disputes. But even then their deposits were not released by the Courts holding them, because the Courts had no knowledge of the action taken in England by the Privy Council, and so they could not possibly release the deposit money.

From the year 1773—when for the first time right of appeal from the Supreme Court at Calcutta to the Privy Council was made available—till the year 1833—when by a Statute of the British Parliament, the constitution of the Privy Council came to be modified—about *fifty* appeals in all had been instituted with the Privy Council from the Indian Courts. The first appeal had been filed in 1799. A majority of appeals were from the Supreme Courts. Appeals from Sadar Diwani Adalats were very small in number.

About the year 1826, Sir Alexander Johnston, while engaged in some antiquarian researches, discovered that a large number of cases involving important questions of law had been in appeal from the Courts in India before the Privy Council for a great many years, and that they had not been heard because of the ignorance of the parties as to the proceedings necessary to be taken in England to pursue those appeals. The records of these appeals had therefore been adorning the *lumber room*. To redeem this state of affairs, the Court of Directors in England made an application to the Privy Council seeking its permission to bring forward these appeals on behalf of the suitors. The transcripts of the unpursued appeals, accumulating in the Privy Council Office, were sent to the East India House, for the purpose of being

examined. The Solicitor of the East India Company prepared report, stating the cause of action, the names of the parties, the amount sued for, and all other requisite particulars respecting each appeal. The report was forwarded to the Board of Control for the purpose of being laid before the Privy Council.

On an examination, the report revealed that the earliest appeal was from Bengal, from a decision pronounced in the year 1799. In all twenty-one appeals were pending from Bengal, ten from Madras, and seventeen from Bombay. None of the appeals from Bombay and Madras was of an earlier date than the year 1818.

The Court of Directors, having thus taken the first step in the right direction towards remedying the failure of justice, consulted several learned persons as to the best means of pursuing the appeals before the Privy Council. Accordingly, in 1832 the Board of Control requested Sir James Mackintosh, Sir Edward Hyde East, and Sir Alexander Johnston to suggest the best course to be adopted in order to cause all the old appeals to be put in train for decision. Mr. Richard Clarke, formerly of the Madras Civil Service, was engaged to arrange all the papers connected with the various appeals.

RE-ORGANISATION OF THE PRIVY COUNCIL

The attention of the British Parliament, in the meantime, had been called to the subject of reorganisation of the Privy Council itself. With the growth of the Empire, the business coming before the Privy Council naturally increased. There were many complaints of the way the Privy Council conducted its judicial work. The Privy Council used to do its work by means of a system of committees. One such committee was that for 'trade and foreign plantations.' It was to this committee that the business of hearing appeals was assigned. The hearings were usually before a sub-committee of five or six persons. The committee which heard appeals had no permanent existence but was collected together from time to time to deal with a batch of petitions. Usually the committee consisted of persons who had little acquaintance with the law.

If possible, a legal privy councillor was put on the committee—the Master of the Rolls often sat in the committee at the close of the eighteenth century. Moreover, all the members had other important work to do. They had not time enough to devote to the judicial work. Often the most important appeals were disposed of with the most indecent haste. According to Keith, in many cases issues were dealt with rather from the point of general expediency than of strict law.

In 1828, Lord Brougham had occasion to comment on the state of the hearing of appeals by the Privy Council and on the extent and importance of its jurisdiction in the following words in his famous speech on the law reform in England.

'They determine not only upon questions of colonial law in plantation cases, but also sit as Judges, in the last resort, of all prize causes. And they hear and decide upon all our plantation appeals. They are thus made the supreme Judges, in the last resort, over every one of our foreign settlements, whether situated in those immense territories which you possess in the East, where you and a trading Company rule together over not less than 70,000,000 of subjects—or established among those rich and populous islands which stud the Indian Ocean and form the Great Eastern Archipelago—or have their stations in those lands, part lying within the tropics, part stretching towards the pole, peopled by various castes, differing widely in habits, still more widely in privileges, great in numbers, abounding in wealth, extremely unsettled in their notions of right, and excessively litigious, as all the children of the new world are supposed to be, both from their physical and political constitution. All this immense jurisdiction over the rights of property and person, over rights political and legal, and over all the questions growing out of so vast and varied a province, is exercised by the Privy Council *unaided and alone*. It is obvious that, from the mere distance of those colonies and the immense variety of matters arising in them, foreign to our habits and beyond the scope of our knowledge, any judicial tribunal in this country must of necessity be an extremely inadequate Court of Review. But what adds

incredibly to the difficulty is that hardly any two of the colonies can be named which have the same law ; and, in the greater number, the law is wholly unlike our own. In some settlements it is the Dutch law, in others the Spanish, in others the French, in others the Danish. In our Eastern Possessions these variations are, if possible, greater ;—while one territory is swayed by the Mahommedan law, another is ruled by Hindu law ; and this, again, in some of our possessions is qualified or superseded by the law of the Budha ; the English jurisprudence being confined to the handful of British settlers and the inhabitants of the three Presidencies.'

The constitution of the Privy Council, at the time was hardly suited to its exercising such a vast and varied jurisdiction. In 1830, Lord Brougham himself became the Lord Chancellor and he decided to introduce a Bill on the subject of the constitution of the Privy Council. The Act, 3 & 4 William IV, c. 41, was passed on 14th August, 1833, *'for the better administration of justice in His Majesty's Privy Council.'* This important Act constituted a committee of the Privy Council to be known as the *'Judicial Committee'*. This Committee was to consist of the President of the Privy Council, Lord High Chancellor and other Privy Councillors holding high judicial offices in the country like the Lord Chief Justice or Judge of the Court of King's Bench, Master of the Rolls, Vice-Chancellor, Chief Justice or Judge of the Common Pleas, Chief Baron or Baron of the Court of Exchequer etc. etc. The Crown was to have the power to appoint two other Privy Councillors as the members of the Judicial Committee.

Under the Act of 1833 the Judicial Committee took on the aspect of an ordinary court of justice. The Act contained provisions regulating its procedure, cost of appeals, and such other sundry items. The grounds of every decision were to be read in the open court. But some traces of the fact that the Judicial Committee was in theory a committee of the Privy Council—an executive body—were left even after the Act of 1833.

Thus the entire appellate jurisdiction of the Sovereign

in Council was henceforth to be exercised solely by the Judicial Committee, which was constituted into an efficient instrument to discharge the vast responsibility.

INDIAN APPEALS UNDER THE ACT OF 1833

The Act of 1833 dealt with the question of the Indian appeals in a specific manner. The 22nd section of the Act provided that as various appeals had been admitted by the Courts of Sadar Diwani Adalat at the three presidencies, and the transcripts of the proceedings had been from time to time transmitted to the Privy Council Office, but the suitors had not taken the necessary measures to bring on the same to a hearing, *His Majesty in Council might direct the East India Company to bring appeals from the Sadar Diwani Adalats of three presidencies to a hearing,* and to appoint Agents and Counsels for the different parties in such appeals, and make such orders for the security and payment of costs as His Majesty in Council should think fit. Such appeals were to be heard and reported to His Majesty in Council, and determined in the same manner, and the decrees of His Majesty in Council were to have the same force and effect as though the same had been brought to a hearing by the direction of the parties appealing in the usual course of proceeding.

The 24th section empowered His Majesty in Council to make rules and orders for regulating the mode, form and time of appeal to be made from the decisions of the Sadar Diwani Adalats, and any other Courts of Judicature in India, and for the prevention of delays in making or hearing of such appeals, and as to the expenses and amount of the property in respect of which the appeal might be made.

By the 30th section it was enacted that two members of the Privy Council, who should have held the office of the Judge in the East Indies or any of His Majesty's dominions beyond the Seas, might attend the sittings of Judicial Committee of the Privy Council as *Assessors,* but without votes, at a salary of £400 a year.

DISPOSAL OF PENDING APPEALS

To provide for the disposal of the appeals from India which were pending before the Privy Council in the absence of any proceedings having been taken by the parties, three Orders in Council were made in the year 1833 under the 24th section of the Act of that year.

The first Order in Council, dated 4th December, ordered that the East India Company should bring to a hearing before the Judicial Committee of the Privy Council all cases of appeal mentioned in the list appended to the said order, the same being appeals from the Courts of Sadar Diwani Adalat in the East Indies, in which no proceedings had been taken in England, on either side, for two years subsequent to the admission of the said appeals respectively. The list contained eighteen cases from Bengal, ten from Madras, and fifteen from Bombay.

The second Order in Council, dated the 18th November, gave further directions in pursuance of the Act of 1833. The East India Company was ordered to appoint Agents and Counsels, when necessary, for the different parties in appeals to His Majesty in Council, pending and mentioned in the said list, to transact and do all things as had been usual for Agents and Counsels for parties in appeals to His Majesty in Council, from the Colonies or plantations abroad.

The third Order in Council of the same date directed that the Company should be entitled to demand payment of their reasonable costs of bringing appeals to hearing by virtue of the said Act, to such an amount and from such parties, and should have such lien for the said costs upon all monies, lands, goods and properties whatsoever and upon all deposits which might have been made and all securities given in respect of such appeals as the Judicial Committee of the Privy Council should direct.

Hitherto, appeals to the Judicial Committee of the Privy Council could be made *from the Courts of Sadar Diwani Adalat*

in cases involving a subject matter valued over £5000, *and from the Supreme Courts in cases valued over* 1000 *pagodas.* There was thus a great disparity of circumstances under which appeals from the two sets of Courts lay to the Privy Council. *This anomaly was done away with* by an Order in Council, dated the 10th April, 1838, enacted in pursuance of the Act of 1833. The Order provided that after the 31st day of December, 1838 no appeals to Her Majesty in Council should be allowed by any of the Supreme Courts of Judicature in India, or by any of the Courts of Sadar Diwani Adalat, unless the petition for that purpose was presented within six months from the day of the date of judgment, decree or order complained of and unless the *value of the subject matter in dispute in such appeals should amount to the sum of ten thousand of the Company's rupees at least*; and that 'from and after the said 31st day of December next, the limitation of £5000 sterling heretofore existing in respect of appeals from the presidency of Fort William in Bengal shall wholly cease and determine.' The Order in Council further provided that nothing contained therein should extend or in any way be construed to extend, diminish or derogate from, the undoubted power and authority of Her Majesty in Council upon the petition at any time of any party aggrieved by any judgment, decree or decretal order of any of the Courts, to admit an appeal therefrom upon such other terms, and subject to such limitations, as Her Majesty 'shall in any such special case think fit to prescribe.'

FURTHER REGULATIONS OF THE PARLIAMENT

In July 1843, the British Parliament passed an Act to make further Regulations for facilitating the hearing of appeals by the Judicial Committee of the Privy Council. This Act provided that appeals might be heard by *not less than three members of the Judicial Committee.*

The next important provision made by the British Parliament to regulate the Indian appeals to the Judicial Committee was in 1845, when an Act was passed to amend the previous

Act of 1833. The appeals to His Majesty in Council from the Courts of the Sadar Diwani Adalat at the several presidencies of Calcutta, Madras and Bombay which had been pending due to the suitors, on account of their ignorance, not having taken the necessary measures to bring them to a hearing, were by now disposed of, because the East India Company brought such cases to a hearing under the Act of 1833. It was, therefore, thought to be necessary *to deprive* the East India Company of the power of conducting the appeals after first January, 1846 *so as to leave the appellants in India free to conduct their appeals by appointing their own* Agents and Counsels in England for the purpose. The Act of 1845 had been enacted to achieve this object. It laid down that the provisions of the Act of 1833 should not be applied to the case of an appeal from the Courts of Sadar Diwani Adalats after the first day of January, 1846. Such appeals were to be managed by the parties themselves. The Act further laid down that appeals from the Courts of Sadar Diwani Adalat after the first day of January 1846 should be considered as abandoned and withdrawn by consent of parties, unless some proceedings were taken in England by one of the parties within two years after the registration of the appeal in the Privy Council's Office.

The provisions of this Act continued to govern appeals from India. In all appeals filed after the 1st day of January, 1846, the management was taken out of the Company's hands and was vested in the respective parties themselves.

HIGH COURTS—APPEALS TO THE PRIVY COUNCIL

In 1861, however, a major change in the judicial institutions in India occurred with the creation of the three High Courts in the three presidencies of Madras, Calcutta and Bombay as a result of the amalgamation of the Supreme Courts of Judicature, the Courts of the Sadar Diwani Adalat and Sadar Nizamat Adalat. The Charters of Justice constituting the three High Courts defined the circumstances under which appeals from them could be made to the Judicial Committee of the Privy Council. An appeal might be made to

the Privy Council in any matter *not being of criminal jurisdiction* from any final judgment, decree, or order of the High Court, if either the value of the subject matter was not less than Rs. 10,000, or the High Court declared that 'the case was a fit one for appeal' to the King in Council.

An appeal could lie to the Privy Council from any judgment of the High Court, made in exercise of its original jurisdiction, or in any criminal case where a point of law had been reserved for its opinion by another court of original jurisdiction, when the High Court declared that the case was a fit one for appeal.

In course of time many more High Courts were established in India. Appeals to the King in Council from these High Courts lay substantially on the same grounds as mentioned above.

The Civil Procedure Code[1], enacted subsequently, also fixed at Rs. 10,000 the appeallable amount in a civil case. Below that amount, appeals could be heard by the Judicial Committee with its own special permission or when the High Court certified that the case was a fit one for appeal.

The Criminal Procedure Code did not contain any provisions regarding appeals to the Privy Council from the judgments of the High Courts in criminal cases. Under the provisions contained in the various Charters, and noted above, such appeals lay only from a judgment of the High Court in its original criminal jurisdiction, or on a point of law reserved for the High Court where the High Court declared it fit for appeal.

The above-mentioned provisions regulated appeals to the Privy Council from the High Courts *'as of right'*. They did not in any way *bar, aborgate* or *curtail* the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, both in civil and criminal cases. The King in Council could grant a special

1. Sections 109-112 C. P. C.

leave to appeal in cases not falling within the above provisions. This was in the exercise of the King's *prerogative* which was left untouched by these Acts or Statutes.

COMPOSITION OF THE PRIVY COUNCIL

The constitution of the Judicial Committee of the Privy Council as settled by the Parliament in 1833, underwent certain changes in course of time. The tenor of these changes was twofold: firstly, the legal element in the Committee was strengthened, so much so that after 1876 the *Lords of Appeal in the ordinary* who used to sit in the House of Lords for hearing appeals from the Courts of England, also formed the nucleus of the Judicial Committee. In a way the composition of the Judicial Committee became identical with that of the House of Lords. Secondly, the Judges of the Dominions like Canada, Australia and South Africa came to have some representation on the Committee.

The Act of 1833 had provided for the appointment of two retired Indian Judges as Assessors to the Judicial Committee. They were to attend the sittings of the Privy Council, but did not have any right to vote. This provision was very helpful in bringing an amount of knowledge and experience to bear upon most of the questions arising in the Indian appeals, which could not by any other means have been rendered so readily available. Some appointments were made under this provision from amongst the retired Judges of the Supreme Courts. Retired Judges of the Sadar Diwani Adalats in India were not, however, appointed to sit as Assessors in Indian appeal cases. This arrangement had some drawbacks. The Company's Courts dealt with cases relating to revenue and the Regulations of the Government. The subject matter of appeals in such cases was as *foreign* to the Assessors as to other members of the Judicial Committee, for they had not much to do with such questions while sitting on the Supreme Courts. Only persons connected with the Company's Chief Courts could remove the doubts and difficulties by which such questions were usually surrounded.

However, the provision of Assessors was not of much efficacy. For long intervals these appointments were left vacant. The position improved only in 1908, when by the Appellate Jurisdiction Act it was laid down that 'if any person being or having been Chief Justice or Judge of any High Court in British India is a member of His Majesty's Privy Council, he shall, if His Majesty so directs, be a member of the Judicial Committee'. The number of persons being members of the Judicial Committee by virtue of this section was not to exceed *two* at one time. In this way the Judicial Committee came to have persons versed in the Indian Law as its full-fledged members.

SPECIAL LEAVE TO APPEAL

As noticed above, in many cases appeals to the Privy Council lay only by way of special leave to appeal granted by the Council itself. The Council was not disposed to grant this leave as a matter of course. It was very reluctant to grant special leave to appeal. In civil cases, the principles on which special leave was allowed were indeterminate. Generally it may be said that special leave of appeal in civil cases was granted only when there was a *substantial question of law* involved or when the case was of some gravity, involving some matter of public interest, or important question of law, or affecting property of considerable amount, or where the case was otherwise of some public importance or of a very substantial character. Viscount Haldane in his judicial pronouncement in the famous case of Hull v Mckenna[1], made a reference to this question as follows:

'In other cases the practice which has grown up, or the unwritten usage which has grown up, is that the Judicial Committee is to look closely into the nature of the case, and, if, in their Lordship's opinion, the question is one that can best be determined on the spot, then the Sovereign is not, as a rule, advised to inter ene, nor is he advised to intervene normally—I am not laying down precise rules now, but I am

1. 1926 I. R. 402

laying down the general principles—unless the case is one involving some great principle or is of some very wide public interest. It is also necessary to keep a certain discretion.... We are not at all disposed to advise the Sovereign, unless there is some exceptional question, such as the magnitude of the question of law involved, or it is a question of public interest in the Dominion to give leave to appeal....In India, leave to appeal is more freely given than elsewhere, but the genesis of that is the requirements of India and the desire of the people of India....It is within the Sovereign's power (to grant special leave to appeal), but the Sovereign looking at the matter, exercises this discretion.'

As the Code of Criminal Procedure made no provisions for appeals from the High Courts to the King in Council, appeals in criminal cases came before the Judicial Committee of the Privy Council *mainly* with the special leave of appeal of the King in Council.

The Privy Council in a number of cases had had occasion to lay down the circumstances under which it used to advise the King to grant special leave to appeal in criminal cases. The Judicial Committee never wanted to act in the same way as an ordinary Court of appeal or review in criminal matters. In Dal Singh's case, the Judicial Committee had occasion to observe: 'The general principle is established that the Sovereign in Council does not act, in the exercise of the prerogative right to review the course of justice in criminal cases in the free fashion of a fully constituted Court of criminal appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred ; and not a mere mistake on the part of the Court below, as for example, in the admission of improper evidence if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions

are, as a general rule, treated as being for the final decision of the courts below'.[1]

In re Dillet's case the Council observed : 'The rule has been repeatedly laid down and invariably followed that His Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of legal process or by some violation of the principle of natural justice or otherwise, substantial and grave injustice has been done'.[2]

In Ibrahim v Rex, the Privy Council again enunciated the basis on which special leave to appeal in criminal cases was granted. "Leave to appeal is not granted except where some clear departure from the requirements of justice, exists ; nor unless 'by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done'. . . . There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future."

In criminal cases the Judicial Committee did not grant special leave to appeal lightly. It was due to the exigencies and the expediency of the circumstances, for otherwise, the number of such appeals would have simply overwhelmed it.

A PECULIAR FEATURE

A peculiar feature of the Judicial Committee, which continued to remind the people of its descent from the Executive Council of the Sovereign, was the advisory character of its decisions. A decision of the Board did not take the form of a judgment. It used to be a sort of a report tendering advice to His Majesty in Council. 'Their Lordships humbly advise His Majesty. . . .', this was the form which the report of the Committee took—a recommendation to His Majesty in Council

1. 44 I. A. 137
2. 11 A. C. 469

for his decision thereon. In practice, of course, the Crown always allowed or dismissed the appeal in question in accordance with the advice thus tendered ; but, the report of the Committee was strictly of no effect until it was confirmed by His Majesty at an ordinary meeting of the Privy Council, when an Order in Council, incorporating the purport of the Committee's recommendation, was passed and as a matter of convention the King in Council always accepted the report of the Judicial Committee as a matter of course. Reminiscent of the executive lineage of the Judicial Committee was another of its features according to which the pronouncements of the Committee were regarded as advisory, and in theory, the Committee did not consider itself bound by its previous decisions. Normally, though, it followed them, yet as a matter of legal theory it was not bound by them. Further, the report of the Committee never took note of any dissentient opinion among its members ; only one decision was pronounced for it would be *absurd* for a body of councillors to tie themselves down to giving the same advice on all similar occasions, and *indecent* for them to give conflicting advice on the same question.

The practice was elaborately discussed by Lord Haldane in Hull v Mckenna in the following words :

' We are not ministers in any sense ; we are a Committee of Privy Councillors who are acting in the capacity of judges, but the peculiarity of the situation is this : it is a long standing constitutional anomaly that we are really a Committee of the Privy Council giving advice to His Majesty, but in a judicial spirit. We have nothing to do with policies, or party considerations ; we are really judges, but in form and in name we are the Committee of the Privy Council. The Sovereign gives the judgment himself, and always acts upon the report which we make. Our report is made public before it is sent up to the Sovereign in Council. It is delivered here in a printed form. It is a report as to what is proper to be done on the principles of justice ; and it is acted on by the Sovereign in full Privy Council ; so that you see, in substance, what takes place is a strictly judicial proceeding.'

MERITS OF THE SYSTEM OF APPEALS TO THE PRIVY COUNCIL

The Privy Council, as a judicial institution, was, perhaps, unique among the Courts of the world. It exercised jurisdiction, to a more or less degree, over many great Dominions, Colonies and plantations. The jurisdiction exercised by the Privy Council was unique in its range. In its scope it embraced the legal interests of one fifth of the human race. It was concerned almost with every known system of jurisprudence, and with juridical institutions of every type, and with every kind of dispute.

The responsibility of exercising such a vast jurisdiction had always been an *onerous* one. It had been undertaken by very eminent lawyers. As a rule, the jurisdiction was exercised by persons who, on account of their political experience, legal learning and professional eminence were eminently qualified for that heavy duty and difficult trust. Inspite of the fact that the Judicial Committee was called upon to administer a variety of different systems of law, with some of which none of its members was even conversant, there had been very little criticism of the quality of its decisions.

From the Imperial point of view, the advantages of the system of appeals to the Privy Council were great. The Common Law of England is at the basis of many of the Indian enactments. The Privy Council formed a connecting link, from this point of view, between India and England, and thus the latest developments in the Common Law there were transmitted to India. Through the Privy Council a common view of many principles of the Common Law and legal issues was enforced throughout the length and breadth of the Empire wherever the Common Law happened to prevail. It enforced a true and uniform interpretation of the Imperial Acts which applied to the Dominions. The Privy Council laid down a common basis of interpretation of the Royal prerogative throughout the Empire. Many Acts enacted by the Imperial Parliament were adopted by the Dominions. The Privy Council enforced a uniformity of interpretation of such Acts. This influence of

the Board was really of great value for otherwise there would have been inevitably a great divergence between the different parts of the Empire in construing the same Statutes.

The Judicial Committee always insisted on the maintenance of the highest standards of justice and the judicial procedure, especially in the field of criminal justice.

The Privy Council rendered a great and meritorious service to India. The association of the Council with India subsisted for nearly one hundred and seventy five years. In the days when the confusion in the field of substantive law was great, and the legislative activity practically negligible, the Privy Council ascertained the laws, settled them, moulded and shaped them. The Judicial Committee came to be looked upon by the Indians with great respect. Its decisions were always masterly, and they form even to-day the fountain source of law in India. The decisions of the Privy Council enriched the Indian Jurisprudence in many respects. It rendered notable judgments in the field of the Statute Law and personal laws. It contributed much to the evolution of the commercial law in India. Its interference in the criminal sphere was very benevolent. Though it interfered very rarely and only under special circumstances, yet whenever it did, it upheld the principle of natural justice and fostered the administration of impartial justice.

On some occasions, and principally in the field of Hindu law, the decisions of the Privy Council did evoke some criticism. On several occasions it appeared as if it wanted to fossilise the ancient practices. But inspite of all that, the service rendered by the Council to the cause of justice in India was really very great. And perhaps, no nobler tribute could have been paid to it than the following remarks of Shri K. M. Munshi, uttered on the occasion of the abolition of the Privy Council's jurisdiction : 'The British Parliament and the Privy Council are the two great institutions which the Anglo Saxon race has given to mankind. The Privy Council during the last few centuries has not only laid down law, but co-ordinated the concept of rights and obligations throughout all the

Dominions and Colonies in the British Commonwealth. So far as India is concerned, the role of the Privy Council has been one of the most important. It has been a great unifying force and for us Indians it became the instrument and embodiment of the *rule of law*, a concept on which alone we have based the democratic institutions which we have set up in our Constitution.'

Continuing Mr. Munshi observed :

'On the 26th of January our Supreme Court will come into existence and it will join the family of Supreme Courts of the democratic world of which the Privy Council is the oldest and perhaps the greatest. I can only hope and trust that though we part with the Privy Council our Supreme Court will carry forward the traditions of the Privy Council, traditions which involve that judicial detachment, that unflinching integrity, that subordination of everything to the rule of law and that conscientious regard for the rights and for justice not only between subjects and subjects but also between the State and the subjects. And no higher tribute can be paid to the Privy Council than my hope that our Supreme Court may be given the strength to maintain the traditions of fearless justice which have prevailed in this Country as a result of the supremacy of the Privy Council.'

The part played by the Privy Council in moulding and shaping the Indian law has been remarkable. Dr. Tek Chand referring to this aspect observed : 'During this period if I may say so, the Privy Council has been a great *unifying force* in the judicial administration of this country, and I would like....to express our high appreciation of the work which it did. At a time when there were no Indian Judges in the High Courts, and when the number of Indian lawyers was very limited, the Privy Council unravelled the mysteries of Hindu Law, it enunciated the principles of Mohamedan Law, and formulated with clarity the customs which were prevalent in this country. Their Lordships of the Privy Council have from time to time elucidated the various Indian Laws with absolutely detached mind. They have laid down the principles on which the judicial

administration of the country was based. No doubt there have been lapses and mistakes, occasionally, but, on the whole the Privy Council has been a great unifying factor and on many occasions has reminded the courts of the country of those fundamental principles of law on which the administration of justice in criminal matters is based . . .'

India has every reason to feel grateful to the Privy Council for the role that it played in developing, moulding and shaping the laws. At a time when there was no link between the various Sadar Courts, Supreme Courts, and the High Courts in India, and when they could interpret the law differently from one another, the Privy Council provided a unifying force, a connecting link between them. The principles of law laid down by this august body were regarded as binding by all the Courts in India, and in this, a jurisprudence applicable to the whole of the British India began to evolve. And if to-day, India is fortunate in enjoying a uniformity in the fundamental laws, it is to a very great extent due to the common ultimate Court of Appeal in the Privy Council. The theory of the prerogative of the Crown provided, when it was most needed, a common Court of Appeal from the highest Courts of India.

Though to-day the Privy Council has nothing to do with the Indian Laws or Legal Institutions, its impact on India would continue to be felt and realised for many generations to come.

DRAWBACKS OF THE SYSTEM

The practice of appeals from India going to the Privy Council suffered from certain drawbacks.

The Judicial Committee situated as it was in London, at a distance of nearly 5000 miles from India, worked under certain obvious handicaps. It was constituted primarily of the British Judges, many of whom had no very intimate personal knowledge of the Indian conditions and manners. The absence of the local knowledge unquestionably was a disadvantage both to the Court and to the counsel, who had to be engaged in England. The Court being insufficiently in touch with the

Indian life could not always appreciate the Indian point of view.

The distant location of the Judicial Committee made the disposal of appeals very *dilatory and expensive.* The system put a wealthy litigant at an advantage, for he could coerce a poor opponent to surrender or compromise by his power to take the case to the Privy Council, and so the system often worked to the distinct disadvantage of the poor litigants.

More important than this was, perhaps, a sentimental objection to the system. The existence of the Privy Council's Jurisdiction was regarded as a symbol of judicial slavery to a Court which, though in theory an Imperial Court, was in practice largely staffed by the English Judges. The question was rather one of national prestige. With the growth of responsible government each Dominion came to regard the system of appeals to a Court sitting in London as a limitation on its status and autonomy. In the fullness of time, appeals to the Privy Council from the Indian High Courts came to be looked upon as the sign of Indian dependence on England. Further, the process of appeals to the Privy Council came to be regarded as casting a reflection on the competency, capacity and integrity of the Indian Judges. It was, therefore, a foregone conclusion that, as soon as India achieved independence, this era of judicial slavery would be put an end to.

THE FEDERAL COURT

The Government of India Act, 1935 sought to inaugurate a federal polity in India. A Federal Court is an essential element in a Federal Constitution. It is at once the interpreter and guardian of the Constitution and a tribunal for the settlement of disputes between the constituent units of the Federation. Consequently, the Act of 1935 established a Federal Court in India.

The Federal Court had an *exclusive original jurisdiction* in cases between the Federation and its constituent units.

The Federal Court had an *advisory jurisdiction* also. The

Governor General could refer any legal question of public importance to the Court for consideration and opinion.

The Federal Court enjoyed a limited *appellate jurisdiction.* Appeals lay to the Federal Court from any 'judgment, decree or final order of a *High Court, if the High Court certified* that the case involved *a substantial question of law as to the interpretation of the Constitution.*

Apart from such cases in which appeals lay to the Federal Court from the High Courts, appeals from the High Courts to the Privy Council were not affected. In cases which involved matters of interpretation of the Constitution, parties had to go in appeal to the Federal Court in the first instance. In all other cases, appeals from the High Courts lay to the Privy Council much in the same way as they lay before the passage of the Act of 1935.

The Federal Legislature[1] was, however, empowered to *extend* the appellate jurisdiction of the Federal Court, within certain limits, and consequently to abolish appeals to His Majesty in Council to that extent.

Appeals from the Federal Court to the Judicial Committee of the Privy Council lay under the following circumstances :

(a) From the *judgment* of the Federal Court rendered by it in the exercise of its *original jurisdiction* ;

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1. Section 206 of the Government of India Act ran as follows :
(i) The Federal Legislature may by Act provide that in such civil cases as may be specified in the Act an appeal shall lie to the Federal Court from a judgment, decree or final order of a High Court in British India without any such certificate as aforesaid, but no appeal shall lie under any such Act unless—

(a) the amount or value of the subject matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than fifty thousand rupees or such other sum not less than fifteen thousand rupees as may be specified by the Act, or the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value ; or

(b) the Federal Court gives special leave to appeal.

(ii) If the Federal Legislature makes such provision as is mentioned in the last preceding sub-section, consequential provision may also be made by an Act of the Federal Legislature for the abolition in whole or in part of direct appeals in civil cases from High Courts in British India to His Majesty in Council, either with or without special leave.

(b) In any other case, by *leave of the Federal Court* or of His Majesty in Council.

APPEALS TO THE PRIVY COUNCIL RESTRICTED

For quite a long period after 1935, the Indian Legislature took no action to extend the jurisdiction of the Federal Court and thereby to diminish the jurisdiction of the Privy Council to that extent. However, such an action became imminently necessary in view of the changed constitutional status of India after 1947. The Federal Court (Enlargement of Jurisdiction) Act, I of 1948, was passed by the Indian Legislature to provide for the enlargement of the appellate jurisdiction of the Federal Court in civil cases. Under the Act, appeals were to lie to the Federal Court from any judgment of the High Courts :

(i) without special leave to appeal of the Federal Court, in the same circumstances in which appeals could have been brought to His Majesty in Council without any special leave ; and

(ii) with the special leave of the Federal Court in any other case. No direct appeal was to lie to His Majesty in Council, either with or without special leave, from any such judgment.

FURTHER PROVISIONS

The previous Act had not completely abolished appeals to the Privy Council. It did not touch appeals in criminal cases. Appeals from the Federal Court were still possible in certain circumstances, i.e. by leave of the Federal Court or of His Majesty in Council.

The new Republican Constitution of India was due to come into force from January 26, 1950. As a result of this, the Privy Council was due to lose all jurisdiction in relation to India. What was more important, the Privy Council was not even to have jurisdiction to deal with and dispose of appeals and petitions which might be pending before it on that date.

In the month of September 1949, there were pending before the Judicial Committee of the Privy Council about 70 civil appeals and 10 criminal appeals from the judgments of the various High Courts in India. In anticipation of the new Constitution, the Constituent Assembly of India passed on 24th September, 1949 an Act to abolish the jurisdiction of His Majesty in Council in respect of the Indian appeals, so that there might be minimum of trouble and inconvenience at the date of the commencement of the new Constitution. The Act was due to come into force on 10th of October, 1949. From that date the Federal Court, as an *interim* measure, was to be invested with the same jurisdiction to entertain and dispose of appeals and petitions from the judgments, decrees or orders of all High Courts of India as 'His Majesty in Council has at present.'

From the date of the passage of the Act to the day of the commencement of the new Constitution, the Privy Council was expected to dispose of a few appeals leaving some appeals still in balance. The Act of 1949 abolished the jurisdiction of His Majesty in Council to entertain appeals and petitions from any judgment, decree or order of any Court or tribunal, within the territory of India, including appeals and petitions in respect of criminal matters. All pending appeals, excepting those that the Privy Council was expected to dispose of during the interval before the new Constitution came into force, were to stand transferred to the Federal Court.

On October 10th, the day on which the new Act abolishing the Privy Council's jurisdiction came into force, India's 175 years connection with the Britain's highest tribunal came to an end.

THE SUPREME COURT

The new Constitution ushered into India the Supreme Court of India as the highest Court of the land. The Supreme Court enjoys the following powers and jurisdictions :

1. *Original Jurisdiction :* The Court has an exclusive original

jurisdiction in cases arising between the Centre and the constituent units.

2. *Appellate Jurisdiction* : (a) An appeal lies to the Supreme Court from any judgment, decree or final order of a High Court whether in a civil, criminal or other proceeding if the High Court certifies that the case involves a *substantial question as to the interpretation of the Constitution.*[1] (b) If the High Court refuses to grant such a certificate, the Supreme Court itself may grant special leave to appeal if it is satisfied that a substantial question of law as to the interpretation of the Constitution is involved.[2] (c) An appeal lies to the Supreme Court from any judgment, decree or final order of a High Court, in a civil proceeding, if the High Court certifies that the value of the subject matter involved in the dispute is not less than *twenty thousand rupees ;* and where the judgment, decree or final order appealed from affirms the decision of the court immediately below, if the High Court further certifies that the appeal involves some substantial question of law ; (d) In cases where the conditions in (c) above are not fulfilled, the appeal lies if the High Court certifies that the case is a fit one for appeal to the Supreme Court.

An appeal in criminal cases lies to the Supreme Court from a High Court, if the latter—

(i) has, on appeal, reversed an order of acquittal of an accused person and sentenced him to death ; or

(ii) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death ; or

(ii) certifies that the case is a fit one for appeal to the Supreme Court.

1. Art. 132 (1)
2. Art. 132 (2)

Apart from the above provisions which confer a right on the people to go in appeal from the High Courts to the Supreme Court, the Constitution vide Article 136 (1) confers a discretion on the Supreme Court to grant *special leave to appeal* from any judgment, decree, determination, sentence or order 'in any cause or matter passed or made by any *court or tribunal* in the territory of India.' The Supreme Court thus enjoys much wider powers in relation to appeals than what the Privy Council used to enjoy in this respect. The Supreme Court possesses the ultimate Jurisdiction over all the courts and legal proceedings in India.

3. *Advisory Jurisdiction :* The President is empowered to obtain the opinion of the Supreme Court on any question of law or fact which is of public importance.

The Constitution expressly lays down that the law declared by the Supreme Court shall be binding on all the courts in India. The Supreme Court is a court of record. Article 144 makes it obligatory for authorities, civil and judicial, to act in aid of the Supreme Court.

Under Article 32 (1) and (2) the Supreme Court has been empowered to issue directions or orders or writs, like the Habeas Corpus, Mandamus, Certiorari etc. for the enforcement of the fundamental rights which have been guaranteed and granted by the Constitution of India. It is indeed a very important power which makes the Supreme Court the guardian of the freedoms and the liberties of the subjects of India.

Adequate provisions have been incorporated in the Constitution to ensure the independence of the Supreme Court. Some of them are :—

1. Every Judge of the Supreme Court holds office until he attains the age of 65 years ;

2. A Judge shall not be removed from his office except by an order of the President passed after an address of each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting has

been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

3. The salaries of the Judges have been fixed by the Constitution. They cannot be varied either to the Judges' advantage or disadvantage. Only an amendment of the Constitution can effect that change.

4. Each Judge is entitled to such allowances and privileges as the Parliament may fix. They cannot be varied to the disadvantage of any Judge during his tenure of office.

5. The expenses of the Supreme Court are charged upon the Consolidated Fund of India.

6. No discussion shall take place in the Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge. In the same way no discussion can take place in the Legislature of a State with respect to the conduct of any Judge of the Supreme Court.

The President is empowered to appoint the Judges of the Supreme Court. A person cannot be appointed as a Judge unless he is a citizen of India and—

(i) has been for at least five years a High Court Judge; or

(ii) has been for at least ten years an advocate of a High Court; or

(iii) is, in the opinion of the President, a distinguished Jurist.

The last clause is an interesting provision. Under it even those persons who, though not actively practising law, are yet very eminent Jurists can be appointed as Judges. This provision appears to have been inspired by the American precedents where some teachers of law have been appointed as the Judges of the Supreme Court, and who have turned out to be very successful Judges.

The provisions relating to the Supreme Court of India are contained in Chapter IV of the Constitution. In no other Constitution are to be found such detailed provisions regarding the highest Judiciary as in the Indian Constitution.

The provisions regarding the Supreme Court are based, to a very great extent, on the analogous provisions relating to the Federal Court of India in Part IX of the Government of India Act, 1935. But there are some important differences also. Whereas the Federal Court was envisaged principally as the highest forum in India for the interpretation of the Constitution, the Supreme Court exercises much wider functions and acts as the highest Court of Appeal in the country. It combines into itself the functions of both—the Federal Court as well as the Privy Council. The appellate jurisdiction of the Supreme Court is much wider than what hitherto had been exercised by the Privy Council.

When the compass of jurisdiction and the extent of territory over which the Supreme Court presides are taken into consideration, the Supreme Court will appear to be the most potent judicial organ in the world to-day.

CHAPTER XVIII

DEVELOPMENT OF CRIMINAL LAW IN INDIA

INTRODUCTORY

During the reign of the Moghuls in India, criminal justice was administered according to the Mohammedan Law of Crimes. The English, when they took over the responsibility of administering Bengal, Bihar and Orissa, found this Law as well established in the country. They did not disturb the arrangement for sometime and allowed this Law to continue in operation as usual.[1]

But the Mohammedan Law of Crimes, however, had many glaring defects. The Law had been designed to serve the needs of a society profoundly different from the one existing in Bengal in the latter half of the eighteenth century. Many of its principles appeared to the English as being repugnant to good government, natural justice and common sense. Many of its rules were fundamentally opposed to the western conceptions of natural justice, order, progress and the good of the society. Naturally, therefore, the English Government was led to mould, refashion and amend the Muslim Law so as to adapt it to their conceptions of policy and behaviour. The Mohammedan Law of Crimes continued to be the law of the land for long, governing all in the mofussil without any distinction of caste or creed but it did so only under the reforming hand of the English Government. Many changes were introduced into it from time to time so much so that in 1860, when the modern Indian Penal Code came into force, the prevailing Mohammedan Law of Crimes—or rather the Anglo Mohammedan Law—had become detached from its base in the Mohammedan Jurisprudence.

MOHAMMEDAN LAW OF CRIMES

Mohammedan Law arranged punishments for offences into four broad classes, namely, *Hadd*, *Kisa*, *Diya* and *Tazir*.

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1. It may, however, be noted that in the presidency towns of Calcutta Madras and Bombay, English Criminal Law was in operation.

There were certain offences which merited *Hadd* punishments. *Hadd* means boundary or limit. The idea was to prescribe, define and fix the nature, the quantity and quality of punishments for certain offences. The Judge had no discretion in the matter. The prescribed punishments could not be increased, decreased, altered or modified. If the offence was established the prescribed punishment had to follow as a matter of course.

Punishments by way of *Hadd* were of the following forms : stoning or scourging, amputation of limb or limbs, and flogging. Some examples of the offences for which the immutable punishments were prescribed were :

1. Zina or illicit intercourse ; death by stoning or scourging ;

2. Theft : amputation of hands ;

3. Falsely accusing a married woman of adultery ; scourging.

These punishments, *barbarous* as they might appear on the face, could be inflicted only under some important limitations and restrictions. *The savagery of the punishment was compensated by difficulty in getting a conviction.* Any doubt would be sufficient to prevent the imposition of *Hadd.* There must be full legal evidence of either two or four persons of proved credit. As for exmaple, a person guilty of *zina* could be punished only if there were *four male eye witnesses.* In the circumstances, one could not be convicted for the offence of *zina* until and unless one defied public decency and committed the offence in the open. An accused could be punished on a confession, but it had to be made four times before the *kazi* and it could be retracted at any time.

Tazir means discretionary punishments. In this case the kind and amount of punishment was left entirely to the discretion of the Judge. It might be imprisonment, exile, corporal punishment, boxing on the ear or any other humiliating treatment. The courts were *free to invent* new punishments according to their whims and notions. These punishments

could be inflicted for those offences for which there were no defined punishments. The number of such offences was inordinately large. The process of trial in such cases was simple in contrast to cases coming under *Hadd*. Conditions of conviction were not so difficult. This could be inflicted on a confession, evidence of two persons, or even on strong presumption. The whole of this part of Criminal Law being discretionary could be regulated by the Sovereign.

Kisa or retaliation was the third form of punishment. The principle of retaliation applied to cases of wilful killing and to certain types of grave wounding or maiming, and gave to the injured person or his heirs a right to inflict a like injury on the wrong-doer.

Kisa could be exchanged with blood money or *Diya*. In certain cases no *Kisa* but only blood money could be demanded. In all those cases where *Kisa* was available the heir of the deceased could accept blood money in lieu of retaliation.

For intentional wounds and maiming a fine could be accepted in lieu of retaliation. For unintentional injuries only fine was awarded according to a fixed scale.

On its face the Mohammedan Law of Crimes appeared to be very crude and severe for it gave sanction to some cruel and barbarous punishments like mutilation and stoning. Yet the claim could be made officially that 'as a system the Mohammedan Law of Crimes is *mild*; for though some of the principles it sanctions be barbarous and cruel yet not only is the infliction of them *rarely rendered compulsory* on the magistrate, but the law seems to have been framed with more care to provide for the escape of the criminals than to found conviction on sufficient evidence and to secure the adequate punishment for offenders'[1].

The opinion of Warren Hastings also was similar, for in his view, 'the Mohammedan Law is founded on the most lenient principles, and an abhorrence of bloodshed.' A close

1. Parl. Papers 1831-32, Vol. XII, 696.

study of some salient features of this Law will prove the truth of these remarks.

DEFECTS

It will appear that the Mohammedan Law of Crimes contained many illogicalities. Its many principles were poles apart from the western notions of justice, order and progress. It was based on those conceptions of state and social relations which the European thought had already discarded. It drew no clear distinction between *private* and *public law*. It embodied the principle that law mainly existed to afford redress to the injured ; it did not emphasize the idea that crime is an offence, not merely against the individual injured, but against the society as such. According to Mohammedan Jurisprudence, crimes were divisible into two categories : those against God, as drunkenness and adultery, as being in themselves crimes of a deeper and more atrocious type ; crimes against man, as murder and robbery. It was only the crimes of former description which were deemed worthy of the public vengeance. The latter, though in fact equally ruinous to the peace of the society, were given up to the *discretion* or *caprice* of individuals ; they were regarded as private injuries to be taken care of by the person injured. These offences were punished by the State but the basic notion was to secure satisfaction for the injured rather than to afford protection to others. The cases of murder, therefore, were taken cognisance of on private complaint. The State did not consider it a part of its duty to prosecute such cases.

A review of the law of murder will expose the *primitive* character of the Mohammedan Law of Crimes. Murders and Homicides were regarded as private grievances. The right to claim *Kisa* or retaliation was *hak admi* or the right of man. It was not the right of the public or of God. Thus if A murdered B, then C, the heir of B or his nearest of kin, had the right to demand death penalty on A. If he did not demand, capital punishment could not be inflicted on A. C might pardon A, or he could be satisfied by accepting blood money from A.

Naturally, this rule of the Mohammedan Law which vested a privilege in the sons or the nearest of kin, to pardon the murderers of their parents or kinsmen was very illogical and unreasonable. This misplaced power of life and death made the fate of a murderer largely depend on the caprice, venality or indifference of the deceased man's relatives. One or two typical cases would illustrate the absurdity of the rule. A murdered his brother to obtain a share of his deceased father's inheritance. B was another brother. Being the next of kin of the deceased he was entitled to demand the *Kisa*. Instead he pardoned A. It was suspected that, as B himself benefited by the murder in so far as he was thus able to obtain a greater portion of the estate, he himself might have connived at the commission of the offence.[1]

Further, as a result of this rule Brahmin murderers often escaped penalty for committing murder of a Hindu. The Hindu relations of the deceased did not demand *Kisa* as they did not wish to incur the *supposed guilt* of exacting the capital punishment of a Brahmin [2]

The evils of the Muslim Law are fully displayed by these instances. Hastings commenting on the particular rule observed : 'This law though enacted by the highest authority which the professors of Mohammedan faith can acknowledge, appears to be barbarous construction, and contrary to the first principle of civil society, by which the State acquires an interest in every member which composes it, and a right in his security. It is law, which, if rigidly observed, would put the life of every parent in the hands of his son, and by its effect on weak and timid minds would afford a kind of pre-assurance of impunity in those who were disposed to become obnoxious to it'.

There are a number of cases to be found in the Bengal Revenue Consultations where murderers were pardoned by the next of kin of the deceased persons after having received such

1. Ben. Rev. Cont., 11th Nov. 1789.
2. ibid.

paltry sums as eighty rupees, or even thirty, twenty or ten rupees. Human life had thus become very cheap.

The Quran had made no provisions for the punishment of a murderer whose victim died without heirs. Lawyers had recourse to *Sunna* or Traditions according to which in such cases the Sultan or the Hakim was the legal claimant on the part of such persons as had none. Abu Hanifa, the great Muslim jurist, had given it as his opinion that the Ruler, who was the heir, was to exact either capital punishment or a fine as he pleased.

In cases where the murdered man was known to have left behind relatives, but none came forward to prosecute the murderer owing to their ignorance of the crime or other circumstances, the offender could not be punished. He had to be kept in prison till some one came forward to demand punishment.

A person might have left behind some minor heirs. Was it necessary to wait until infant heirs had grown up before a murderer could be capitally punished? Abu Hanifa maintained that the adult relatives could exact the death penalty without waiting for infant heirs to become mature. His disciples, on the other hand, held that a murderer must be kept in prison until it had been ascertained whether all the heirs demanded capital punishment. The Judge could follow any of these two courses of action.

It was a rule of the Mohammedan Law that if one of the heirs of the murdered person pardoned him, the murderer could not then be executed even though the other heirs demanded his death; they were merely entitled to their share of the blood money which the criminal paid.

Murder and Homicide were held to be *justifiable* under certain circumstances. Parents could not be sentenced to death for murdering their children. Grandfathers and grandmothers enjoyed a similar immunity in respect of their grandchildren. A person could kill a man who attempted to rape his wife.

Abu Hanifa, the great Muslim jurist, distinguished between two kinds of Homicide, *Amd* (wilful murder) and *Sabih Amd* that is culpable homicide not amounting to murder. The distinction was not based on any logical test of the intention of the offender, but was based on the method by which the crime was committed—the *nature of the instrument* used to commit the offence. If a man killed another by throwing him from the upper floor of a house, or throwing him down a well or a river, strangling him or striking him with his fist, stick, stone, club, or any other weapon on which there was no iron and which would not draw blood, he was guilty only of *Sabih Amd*, not of murder, and so was liable for the payment of *blood money*; he could not be capitally punished. On the other hand, if the crime of murder was committed with a sharp instrument, say by a knife, or some other blood drawing instrument, the offender was liable to be punished capitally. The balance of the opinion of the Muslim jurists was that the intention to kill could not be inferred from administration of poison, because poison is occasionally given as a medicine also and it was quite possible that in the particular case it might have been so administered and that the man giving it did not know that the quantity was excessive. The rank *absurdity* of these propositions was very forcibly brought out by Warren Hastings by reference to a case which had come to light just then. 'A man held the head of a child under water till it was suffocated, and when it died he made a prize of her clothes and the little ornaments of silver which she wore. It was evident that his object was no more than robbery, and murder was the means both of perpetrating and concealing it. The extraordinary manner in which the murder was committed, it may be suspected, was suggested to him by the distinction (in the cases of homicide by Mohammedan Law) made by the law in question, by which he was liable to no severer retribution than for the simple robbery; whereas he would be sentenced to suffer death, had he killed the deceased with a knife or a sword, although he might have been impelled to it by sudden passion and not premeditated design. Yet for this horrid and deliberate act he is pronounced

guilty of manslaughter only, and condemned to pay the price of blood which seems invariably fixed at Rs. 3333-5-4.'

This strange distinction in the Law of Homicide maintained by the Muslim jurists without any reference to the intention of the accused at the time of committing the crime, was responsible for much injustice and inequality of the decisions in the country. It gave rise to an evil tendency due to the 'little dread which an indigent offender feels of a penalty which he knows can never be literally inflicted on him', as he was unable to pay the blood money that he might be directed to pay. It was frequently the cause of murder and it served to screen the crime of robbery with no additional consequence to the criminal.

The opinion of Abu Hanifa on the point was not unchallenged. His two great disciples, Abu Yusuf and Mohammad, differed with him on the point. They believed in the more rational doctrine that if the intention of murder be proved, no distinction should be drawn with regard to the method employed. But in Bengal, it was the opinion of Abu Hanifa that was followed. This was a great *defect* in the Mohammedan Law of Crimes.

There were certain cases in which the Muslim Law required the sentence of death to be executed on the murderer by the nearest of kin of the deceased. 'This law', said Warren Hastings, 'is still more barbarous, and in its consequences more impotent. It would be difficult to put a case, in which its absurdity should be more strongly illustrated, than in one now before us, of a mother condemned to perish by the hands of her own children for the murder of her husband. Their age is not recorded, but by the circumstances, which appear in the proceedings, they appear to be very young. They have pardoned their mother. They would have deserved death themselves, if they had been so utterly devoid of every feeling of humanity, as to have been able to administer it to her who gave them life.' Hastings was of opinion that the courts of justice should be interdicted from passing so horrid a sentence.

The above discussion makes it clear that the law of murder needed *radical alterations* if life in the country was to be made secure.

The Muslim Law approved cruel and terrible punishments like *mutilations*. Such a punishment was frequently awarded and executed by the courts in Bengal. Such a punishment was inconsistent with the refined notions of mercy and justice. The punishment of mutilation meant slow, cruel and lingering death to the unfortunate person who had suffered it.

Besides all this, the Mohammedan Law of Evidence was very technical and primitive, *making conviction of offenders very difficult*. No Mohammedan could be convicted capitally on the evidence of an *infidel*. In other cases a Mohammedan's word was regarded as being equivalent to that of the two Hindus. The evidence of two women was regarded as being equal to that of one man. The Law required that there must be a *specific number of witnesses* before an accused could be held guilty of a particular offence. Thus for convicting a person of rape it was necessary to have four witnesses who would swear that they saw the accused in the actual act of committing the offence. A thief could be convicted only on the evidence of two men, or one man and two women, as the evidence of two women was regarded equal to that of a man. Difficulty of proof made the enforcement of the law almost impossible. Very direct proof was in all cases required and the circumstances to set aside evidence were many. The Magistrate of Purnea declared, 'The Mohammedan Law seems more adapted to afford redress to the party aggrieved than to inflict chastisement on the criminal and make an example to deter others.'

There were many drawbacks in the application of the doctrine of *Tazir*. No specific punishments were prescribed in this sphere. The Judges enjoyed a complete discretion to award any punishment to an offender. The punishment could be unduly severe or ridiculously light. There was no standard, no measure of punishment and everything depended on the personal whim and caprice of the presiding Judge. There was thus much scope for corruption and bribery in this respect.

The Judges of the Murshidabad Court of Circuit in 1802 commented on the state of affairs in these words : We are of opinion, that from the discretionary mode in which the Mohammedan criminal law is administered, the administration of it, admits both of too much lenity and too much severity,—*at any rate of too much uncertainty*. An offence which to one law officer, may appear sufficiently punished by a month's imprisonment, shall from another law officer, incur a sentence of three or more years. Even in the heinous crime of gang robbery, our records will show sometimes a sentence of fourteen years transportation, and sometimes a two years confinement.' To improve the administration of law and justice it was absolutely necessary to lay down the limits within which the courts could award punishments for various offences.

Evidently, the Mohammedan Law was not well adapted to the suppression of crimes in the society. There were many features, rules and principles in it which no civilized government could tolerate for long. It was deficient and inadequate in many respects. It could not be the basis of administration of a new, progressive and growing society without incurring radical modifications and amendments.

The British Government at Bengal allowed the Muslim Law of Crimes to remain in force but it was subjected to many reforms and changes. Beginning with Lord Cornwallis, the process of adapting it to new social exigencies and ridding it of its primitive and archaic character continued unabated till India came to have the Indian Penal Code in 1860. All those features which in the words of Ilbert were impossible to enforce, 'the law of retaliation for murder—of stoning for sexual immorality or of mutilation for theft or to recognise the incapacity of unbelievers to give evidence in cases affecting Mahomedans,'[1] the most glaring defects of the Mohammedan law, were gradually removed by the Regulations and the legal system was made workable.

The process of repealing, amending, and supplementing

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1. Ilbert the, Govt. of India, p. 355.

the Mohammedan Criminal Law by enactments based on English principles went on until the Mohammedan Law was wholly superseded by the Indian Penal Code in 1860.

FIRST CHANGES—1790—CORNWALLIS

In 1773, Warren Hastings formulated certain proposals for the amendment of the Criminal Law in certain respects and placed them before his colleagues of the Council for consideration and approval. The matter was, however, postponed at the time as it was thought that in such a delicate matter no precipitate action should be taken. Nothing further seems to have happened in this respect during Hastings' regime.

The first systematic attempt to modify the Law of Crimes was made by Cornwallis in 1790. The general state of the administration of criminal justice throughout the provinces was exceedingly and notoriously defective. The evils complained of proceeded from two sources: firstly, gross defects in the Mohammedan Law; secondly, defects in the constitution of the courts. In 1790, Cornwallis took steps to re-organise the criminal judicature of the country.[1] Along with it he also carried out certain reforms in the Criminal Law. There were certain parts in this Law as were most evidently contrary to natural justice and the good of society, and it was essentially incumbent on the government to introduce necessary amendments in this respect and not to allow the flagrant abuses in the exercise of criminal justice any longer. A Regulation passed on 3rd December, 1790 carried out these reforms in the Mohammedan Law of Crimes.

In the first place, *intent* was made the criterion of murder; instead of the nature of the instrument employed. According to the opinion of Abu Hanifa, a murderer was not liable to capital punishment if he committed the act by strangling, poisoning or with a weapon such as a stick or a club on which there was no iron, or by such an instrument as was not usually adapted to drawing of blood. This archaic rule was

1. See page 147.

abrogated. Henceforth, the *apparent* intention of the criminal in such instances was to regulate his sentence instead of the mere mode of the commission of the crime. Such a rule seemed evidently to follow from the plainest principles of natural reason. Moreover, the opinions of Yusuf and Mohammad, Abu Hanifa's successors and disciples were in favour of the rule that the *intention* and not the mode or instrument should be considered in cases of deprivation of life. Accordingly section 33 of the Regulation of 1790 laid down : 'That the doctrine of Yusuf and Mohammad in respect to trials for murder be the general rule for the officers of the courts to write the *futwas* or law opinions applicable to the circumstances of every such trial, and the distinctions made by Abu Hanifa as to the mode of commission of murder be no longer attended to, or in other words, that the intention of the criminal either evidently or fairly inferable from the nature and circumstances of the case, and not the manner or instrument of perpetration (except as evidence of intent) do constitute the rule for determining the punishment.'

In the second place, the option of the next of kin of the deceased to remit the penalty of death on the murderer was taken away. The evil consequences of such crimes which in this way escaped punishment were so manifest and frequent, that to take away the discretion from the relations seems absolutely requisite to secure an equal administration of justice. The change, it was expected, would constitute a strong additional check on the commission of murder and other crimes, which at that time were often committed with impunity under the idea of an escape, through the notorious defects in the Law.

Accordingly, section 34 of the Regulation of 1790 laid down that in case of murder, the relations be in future debarred from *pardoning* the offender ; and that the law be left to take its course upon all persons convicted thereof without any reference to the will of the kindred of the deceased.

PUNISHMENT OF MUTILATION ABOLISHED

The Mohammedan Law of Crimes as it was administered in Bengal at the time allowed infliction of the barbarous punishment of mutilation of limbs in some cases. The punishment was very primitive and barbarous and its victim was left to undergo a slow and painful death. As early as 1790 Cornwallis had suggested that where the Mohammedan Law prescribed amputation of legs and arms or other cruel mutilation, the Government ought to substitute temporary hard labour or fine and imprisonment according to the circumstances of the case. Nothing came out of the suggestion at that time. In 1791, however, this awful punishment was abrogated. On 10th October 1791 the Governor General in Council resolved that the punishment of mutilation should not be inflicted on any criminal in future; all criminals thereafter sentenced by the Courts to lose two limbs, should, instead of being made to suffer such punishment, be imprisoned and kept to hard labour for fourteen years; and the criminal sentenced to lose one limb should, instead of being made to suffer such punishment, be imprisoned and kept to hard labour for seven years.

FURTHER MODIFICATIONS 1792

Next year some more modifications were incorporated in the Law of Crimes relating to Homicide. On 13th April, 1792 the Governor General in Council laid down the following propositions:

1. In cases of murder the refusal of the relations to *prosecute* be no longer considered as a bar to the trial or condemnation of the offender; but in the event of such refusal, the Courts of Circuit were to proceed with the trial in the same manner as if the slain had no heir. The Law Officers attached to the Courts were to render their *futwas* on the supposition that the heir had been the prosecutor and present at the trial.

2. The preceding rule was also to be applied to all cases of murder wherein it was known that the slain had an

heir who was legally entitled to claim *Kisa*, but who would neither appear after a reasonable time had elapsed nor communicate his intention by vakeel or otherwise of pardoning the offender.

3. In either of the cases mentioned above, the Court was not to pass any sentence. The record of the trial was to be forwarded to the Sadar Nizamat Adalat, which was to pass such sentence as would have been passed had the heir been the prosecutor and present at the trial.

Slowly, therefore, the Law of Murder was freed from the discretion and caprice of the heirs of the deceased. Gradually was murder transformed from a private injury into a public wrong. Cornwallis freed the Law of Homicide of its primitive character and brought it into line with the notions that the Criminal Law was not meant for private redress but was a public law, every criminal offence being as one committed against the whole society and not merely against a particular individual.

LAW OF EVIDENCE MODIFIED : 1792.

Mohammedan Law did not permit a Hindu to give testimony in a case where a Muslim was involved. Cornwallis abolished this archaic rule too. On 27th April, 1792, the Governor General in Council resolved :

'That the religious tenets of witness be no longer considered as a bar to the conviction or condemnation of a prisoner ; but in cases in which the evidence given on a trial would be deemed incompetent by the Mohammadan Law, on the plea of the persons giving such evidence not being of Mohammadan religion, the law officers of the Court of Circuit were to declare what would have been their futwa supposing such witnesses had been of Mohammadan persuasion.'

In all such cases the Court of Circuit was not to pass any sentence. The records of the trial were to be sent to the Nizamat Adalat for orders. Sentences in such cases were to

be passed as if the witnesses for the prosecution had been Mohammedans.

NO CHANGE IN 1793

This arrangement for the administration of civil justice was radically reformed by Cornwallis in 1793[1]. On May 1, 1793 the Cornwallis Code—a body of forty eight Regulations—was passed. No change of substance was made in the criminal judicature of the country as it had been reformed only in 1790. Regulation IX of 1793 in effect restated the enactments about the modifications introduced in the Mohammedan Law during the last three years.

FURTHER CHANGE 1797

The Law was further *explained* in 1797. If the prisoner was convicted of wilful murder, he was to be punished without any reference to the heirs of the killed, as if (a) all heirs of the slain entitled to prosecute the prisoner for *Kisa* had attended and prosecuted him; (b) all of them were of an age competent to demand *Kisa*; and (c) that they had all demanded *Kisa*.

Another principle laid down was this: If after the trial the Native law officer declared the prisoner to be not guilty, the Judge was to acquit him. If, however, the Judge did not approve of the verdict, he was to refer the proceedings to the Sadar Nizamat Adalat.

In cases where the Mohammedan Law made a person convicted of homicide liable to pay blood money (as in the case of unintentional murder) the Court of Circuit was to commute the fine to imprisonment for such period as it considered adequate for the offence. A sentence of life imprisonment had to be referred to the Sadar Nizamat Adalat.

Further, if the application of the Mohammedan Law appeared to the Judges repugnant to justice, it was adhered to if in favour of the prisoner; if against him, the Judges were

1. See page 166.

to recommend mitigation or pardon of the punishment to the Governor General in Council.

Regulation XIV of 1797 was an important measure indicating a humanitarian and benevolent spirit in the Authorities at the time. The Regulation was intended to remedy an evil flowing directly from those rules of the Mohammedan Law according to which persons guilty of certain types of homicide were condemned to pay blood money. There were a large number of persons who being condemned to pay such fine were lodged in prison as they were unable to pay it. The sentence would have operated as one for life imprisonment, and so the Government thought it expedient to provide relief in such cases. Accordingly, the following provisions were enacted.

1. Relief was granted to the persons already in prison on account of inability to pay the blood money;

2. Hereafter, no fines were to be imposed for the benefit of private parties. Fines imposed were to be for the use of the Government.

In such cases a definite term of imprisonment in lieu of fine was to be fixed, so that at the expiration of the term the persons convicted were to be discharged although they did not pay the fine.

CHANGES IN 1799

The tenor of changes, hitherto, had been principally in the direction of doing away with all operation of the will of the heirs in cases of murder. But not all aspects of the law of homicide had been touched as yet. There were certain homicides which were regarded as justifiable by the Muslim Law—the Law that had been in operation up to this time. This provision was abrogated only in 1799, being regarded as repugnant to the principles of public justice. Regulation VII of 1799 laid down that in all such cases sentences of capita punishment were to be passed. Such cases were: A parent

killing the child; a grandparent killing the grandchild; a master committing the murder of the slave.

THE DOCTRINE OF *Tazir* : CHANGES OF 1803

The Mohammedan Law had allowed a very wide field of operation to the discretion of the Judge. In this sphere the nature, quality and the kind of punishment could be prescribed by the Judge according to his notions of justice and fair play. There was no standard by which punishments in this field could be regulated. The result was disparity and lack of uniformity. Same offences were dealt with differently by different Judges according to their own whims. The position was not conducive to a sound administration of criminal law. Regulation LIII of 1803 was enacted to improve matters in this respect.

The cases in which *Tazir* or discretionary punishment could be passed were :

(i) Offences for which *no specific penalty of Hadd* or *Kisa* had been prescribed by law. The offences were not serious or of a heinous nature.

(ii) There were crimes within the specific provisions of *Hadd* or *Kisa*. If in such cases the proof for the commission of crime was not such as the law required for the award of specific penalties, but nevertheless it was sufficient to establish a strong presumption of guilt, the sentence of *Hadd* or *Kisa* was not passed. Some other punishment in the discretion of the Judge was awarded to the offender. These were cases where owing to some technical difficulties and/or insufficiency of proof or because of some other special circumstances, the *Hadd* or *Kisa* could not be awarded, but some other punishment was awarded.

(iii) Heinous crimes requiring exemplary punishment beyond the prescribed penalties, because such offences were detrimental and injurious to the society in a high degree. The Sovereign had an unlimited discretion in this respect.

For determining the punishment to be adjudged by the criminal Courts in such matters and also to maintain uniformity and adequacy of punishment of offenders according to the criminality of offences against them, the provisions made were : In cases where a person was liable to discretionary punishments, the *futwa* of the Law Officer was merely to declare the same generally, stating the grounds why the prisioner was subject to discretionary punishment.. In such cases the punishment was to be proposed by the Judge of Circuit or the Sadar Nizamat Adalat.

If the crime of which the offender was convicted had been covered by some Regulation, the punishment was to be fixed accordingly. If the cause was one which under the Regulations had to be referred to the Sadar Nizamat Adalat, the Judge was to transmit the trial with his own opinion thereon to the Adalat for its consideration and orders.

No punishment was to be inflicted only on suspicion. If in a particular case the evidence fell short of legal requisite for *Hadd* or *Kisa*, but was, nevertheless, sufficient to convict the prisoner on strong presumptive proof or violent presumption, the Judge was to sentence the accused to the full amount as if the prisoner was convicted on full legal evidence.

For cases for which no stated penalty had been prescribed by any Regulation, or provided by the Mohammedan Law, the maximum punishment was to be thirtynine stripes and imprisonment with hard labour for seven years.

ROBBERY

Robbery was the commonest of crimes in Bengal at the time. The Mohammedan Law maintained many distinctions which 'were evidently repugnant to the principles of public and equal justice.' It was very necessary to make certain provisions for the more certain punishment of this heinous crime.

Under the Mohammedan Law, theft with stealth was punishable with amputation except when the value of the

property stolen was less than ten dirhams (two or three rupees). For the first offence, right hand was amputated; if committed for the second time the left leg would go. But as in other cases of *Hadd*, confessions were discouraged and many technical exceptions had been introduced making these amputations merely of rare occurrence. Robbery with violence was punishable with the amputation of the right hand and left foot. Robbery with murder was punished with death preceded by amputations. The robbers could take advantage of many conditions and exceptions to evade the rigours of law. A series of distinctions protected the robber, as for example, a robber being a minor, lunatic or relation of the person robbed etc.

Regulation LIII of 1803 put the law on a more rational basis. It abolished all technical distinctions. It abolished the necessity of taking evidence in a particular way and enabled convictions to be based on confessions, evidence of creditable witnesses, or strong circumstantial evidence. The law was much simplified. For robbery with violence, punishments prescribed were death, transportation for life and imprisonment. Seven years' imprisonment was provided for simple robbery.

ADULTERY

Coming under the category of *Hadd*, the crime of Adultery under the Mohammedan Law carried the punishment of stoning or scourging. Evidence needed for conviction was so technical as to make conviction nearly impossible The need of four competent male witnesses was rigorously insisted upon. Presumptive proof was declared to be insufficient to warrant conviction of the offence. The law was rationalized by Regulation XVII of 1817. Convictions, henceforth, could be based on confession, creditable testimony or circumstantial evidence. The maximum punishment to be inflicted was thirty stripes and imprisonment with hard labour for seven years.

MUSLIM LAW CEASES TO BE THE GENERAL LAW—1832

Above is a summary—only a bare summary—of the

changes made in the Muslim Law of Crimes by the English before the enactment of the Indian Penal Code. During the period of hundred years that the Muslim Criminal Law remained in force under the British, it underwent many refinements, modifications and amendments. It could not have been workable otherwise. It was an *anarchaic and primitive system of law.* It was incumbent on the British to amend it in certain respects so as to secure an efficient administration of criminal law and justice, to protect life, liberty and property of the people and to avoid manifold inequalities and gross injustice. After an initial hesitation the Authorities decided to face the question of modifying the Muslim Law boldly and courageously. Cornwallis was the precursor of this process and the exponent of the new policy.

The method adopted to modify this Law was indirect and circuitous. The Mohammedan Law Officers formed an integral part of the criminal Judicature of the country. It was thought that they might have some objection in giving their *futwas* according to the modified version of the Muslim Law. Therefore, the expedient adopted was to ask them to give their *futwas* on the basis of certain supposed circumstances—fictions as they may be called. For example, to avoid that rule of the Muslim Law which allowed conviction of a Muslim on the testimony of a Muslim only, a new rule was made under which the Law Officers were to give their *futwas* as if the witnesses before the Court were Mohammedans, though actually it might not be so. Similarly, to avoid the rule of volition and discretion of the heirs of the deceased in cases of murder, the *futwa* was to be given on the *hypothesis* or the *fiction* that all the heirs had prosecuted the accused. The method though cumbersome was the only one which was possible under the circumstances. The Law Officers could not be dispensed with. The Judges were all Englishmen, who, apart from their ignorance of the law, were not well acquainted with the customs, manners and language of the people. It would have been very difficult for them to dispense justice in the absence of the Muslim Law Officers

who would not deliver *futwas* on the basis of the changed law.

Many other changes in the Muslim Law were introduced, not expressly through the Regulations, but by references to the Sadar Nizamat Adalat. Section LIII of Regulation IX of 1793 had provided that 'Whenever the judges shall *disapprove* of any part of the proceedings held on trial, or of the *futwa* delivered by the law officers they are not to pass sentence on such cases, but shall complete the trial, and transmit to the Nizamat Adalat a copy of all the proceedings and the *futwa* of the law officers, with a separate letter stating the grounds of their disapproval, and wait the sentence of that Court.' Under the provision many references were constantly made by the Courts of Circuit to the Sadar Nizamat Adalat resulting in many indirect changes in the substantive law of crimes.

Regulation I of 1810 made provisions for dispensing with the necessity of the attendance or *futwa* of the Law Officers of the Courts of Circuit, whenever that might appear to be *advisable.* In such cases the Judges were not to pass any orders or sentences, but were to transmit the proceedings of the trial to the Sadar Nizamat Adalat, with their opinions. The Nizamat Adalat was finally to propose the sentence.

Regulation VI of 1832 was important in so far as it *marked the end of the Mohammedan Law of Crimes* as a general system of law applicable to all persons in the country. The purpose of the Regulation was to dispense with the necessity of Native Law Officers. The Government considered it desirable to enable the European functionaries who presided in the Courts for administration of criminal justice to avail themselves of the assistance of respectable Natives in conducting criminal trials. Further, it was offensive to the feelings of many persons who did not profess the Mohammedan faith to be liable to trial and punishment under the provisions of the Mohammedan Criminal Code. The Regulations passed by the Government from time to time had

rendered it unnecessary to maintain any longer that form of trial towards such persons. To achieve these objectives Regulation VI of 1832 was enacted.

Under the Regulation, the Judge was authorised to avail himself of the assistance of the respectable Natives in any of the following three ways :

(i) By referring the case, or any point in it to a *Panchayat* of persons who would carry on their enquiries apart from the Court, and report the result to it.

(ii) By *constituting* two or more persons as *assessors*, with a view to obtaining advantages which might be derived from their observations, particularly in the examination of witnesses. The opinion of each of the assessors was to be given separately

(iii) By employing the Natives more nearly as the *Jury* ; the mode of selecting the jurors, the number to be employed, and the manner in which their verdict was to be delivered, were all left to the discretion of the presiding Judge.

In cases where any of the above modes was adopted, the *futwa* of the Mohammedan Law officer was unnecessary and might be dispensed with. The ultimate responsibility to decide cases was vested *exclusively* in the presiding Officer. In cases where the crime was one for which the Judge was not by any Regulation competent to pass sentence, reference was to be made to the Nizamat Adalat.

Any person not professing the Mohammedan faith, when brought for trial on an offence, might claim to be exempted from trial under the provisions of the Mohammedan Criminal Code. It was to be the duty of the Judge to comply with such a request and proceed with the trial in accordance with the method of Jury as detailed above.

It also became optional for the Judge of the Sadar Nizamat Adalat to require a *futwa* or otherwise, as might appear to him necessary or expedient.

After the Regulation of 1832, it became *discretionary* for the Judge to obtain *futwa* in every case. The old rule which made the obtaining of *futwa* obligatory for the Court was abrogated. If the *futwa* was not to be obtained then the trial Judge could utilize the services of the Natives in any of the three ways laid down. This procedure was *discretionary* with the Judge. But, if the accused happened to be a non-Muslim he could always ask the Court to dispense with the Mohammedan Law. Then the Court had no option in the matter. It had to adopt the alternative procedure explained above.

The non-Muslims thus secured an exemption from the Muslim Law but it was not clear as to what law would apply to them in its place.

For all practical purposes, no *futwa* was ever called for after the Regulation except in very exceptional circumstances. Trials were held with the help of the Jury, the working of which was hardly satisfactory. Campbell describes the system in this way :

'No one is compelled to serve on the jury ; it is alien to the feelings and customs of the country, people cannot be induced voluntarily to sit upon it, and for all practical purposes it is an entire failure. The Panchayat or jury of arbitrators, chosen by the two parties to decide between them in civil cases, is a native institution, but to be summoned by Government to decide upon the guilt or innocence of a person in whom they take no interest is a hardship and unprofitable responsibility much disliked by all Natives. In fact, the judge generally puts into the box some of the pleaders and such people about the court, in order to comply with the law, intimates to them very broadly his opinion, they always agree with him and there is no more trouble, for having taken their opinion, he may decide as he chooses'.

AGRA, BANARAS

The above account of the development of the Law of Crimes in Bengal may be taken as applicable to Banaras and other ceded and conquered territories which all formed part

of the Bengal Presidency. On certain matters, however, special legislation was undertaken. The most typical example was the privilege extended to the Brahmins of Banaras of not being punishable with death (Reg. XVI of 1795), transportation being substituted for the capital sentence. Regulation XVII, Section 15, however, abolished the privilege in 1817.

MADRAS

The Muslim Law of Crimes was operative in Madras also. Legislation in this field followed the same course as in Bengal. The reforms of 1790-93, which were incorporated in Bengal in Regulation IX of 1793, were made applicable in Madras under Regulations VII and VIII of 1802. No useful purpose would be served by going over the various changes that occurred in Madras, their tenor being similar to those of Bengal.

BOMBAY

The case of Bombay was a little peculiar. The administration of criminal justice proceeded on lines different from those laid down for Bengal and Madras. The Muslim Law of Crimes was not the general law. The reason for this was that large territories making part of the Bombay Province had not been under the Muslim rule at the time of annexation.

The Law of Crimes in Bombay was the personal Law. The scheme was laid down by Section XXXVI of Regulation V in 1799. Christians and Parsees were to be judged according to the English Law ; the Muslims and the Hindus, according to their own respective laws. The Regulation carried out certain modifications in the Muslim Law of Crimes on the same lines as in Bengal in 1793.

In course of time, the territory under the Government of Bombay became much augmented by the annexation of the Maratha districts. The administration of justice in these territories was more or less customary and not specifically according to the Hindu Law of Crimes. However, in 1827 Elphinstone the Governor of Bombay, being convinced with the

necessity of a better and more uniform system of law, passed a series of Regulations which came to be known as the *Elphinstone Code* which put the law of the province of Bombay upon a new footing. The Code of 1827 contained considerable merit about it.

Regulation XIV of this Code contained a logical and self contained penal code which remained in force until it was superseded by the Indian Penal Code. Its preamble recited that it had been the practice of the British Government of Bombay to apply to its subjects respectively their peculiar laws as modified and amended according to necessity, by the Regulations. The Courts ascertained the Native Law in each case, as it occurred, by a reference to the Law Officer of the religion of the offender. The Regulation in question claimed to be an expression of the 'general result of the practice of the courts' which would 'secure the more steady observance of the principle of administering to individuals the law of their religion', while it would also 'provide a code easy of access for those individuals of the community to whom, as not being subject to any specific national or religious code of criminal law, the English law has with considerable inconvenience been hitherto applied.'

The Regulation was a short one, containing only forty-one sections in all. It was very sketchy and not very exhaustive or elaborate. The classification of offences was not systematic but very rough, confounding minor offence with the major ones.

CHAPTER XIX

A

DEVELOPMENT OF THE LAW IN INDIA

Two things are essential for a sound and effective administration of justice—a well organised system of Courts and a well developed system of law. During the whole of their political career in India, the English strove to evolve a system of judicature in accordance with their own liberal traditions and suitable to the exigencies of the country. The process started very early—as early as 1661. For the first two hundred years—from 1600 to 1833—the English made and unmade various systems of Courts in an endeavour to achieve a suitable system of judicature. For all this time India was singularly devoid of law. There was no conscious attempt on the part of the Authorities to develop a system of law along with the system of Courts. The Courts sought to administer justice between man and man without an adequate, certain and well defined body of laws. The Judges wielded a wide discretion. The principles of law differed from place to place, court to court and person to person. The legal system lacked coherence, uniformity and certainty. Justice administered was haphazard, discretionary and incoherent.

But then, a time came when efforts to ascertain and define the law also started. India came to have many major codes on fundamental topics of law. From uncertainty to certainty from diversity to uniformity, and from confusion to coherence, law in India has travelled a long way in not a very long period.

LAW IN THE PRESIDENCY TOWNS

The course of development of the law in the three presidency towns was radically and fundamentally different from that followed by the system of law in the Mofussil.

These towns were founded by the Company on different dates under different circumstances. Madras was established

in 1639, as a result of the grant of a piece of land by a Hindu Raja.[1] Bombay was ceded to the English King in 1661, who transferred it to the Company in 1668 on a small annual rent.[2] The town of Calcutta emerged as a result of the grant of Zemindary of a few villages in 1698.[3]

The three presidency towns were the first to fall under the sovereignty of the British Crown. The English Law as existing in England in 1726 came in operation in these setttlements as the general law.

How and when was the English Law introduced there?

The Charter of 1661 is the *first Charter* having a bearing on the question of introduction of the English Law in these settlements. The Charter authorised the Governors and Councils in the Company's settlements to judge all persons 'belonging to the Company, or that should live under them', in all causes, civil and criminal, according to the laws of England.[4]

The only settlement to be established hitherto in India was that of Madras, where the Governor and Council came to administer justice in accordance with the English Law prevailing in England at the time. It may, however, be noted that the Charter introduced the English Law in Madras more as a matter of theory than in practice, for, the Authorities, on whom lay the responsibility to administer justice, did not have an *adequate* knowledge even of its fundamentals.

Along with the transfer of Bombay to the Company in 1668, Charles II issued a Charter which required application of the English Law in the settlement. Accordingly, the Portuguese Law, prevailing hitherto, was suppressed in favour of the English Law in 1672.[5]

The Charter of 1726 established three Mayors' Courts in

1. See Chapter II, page 10.
2. See Chapter III, page 22.
3. See Chapter IV, page 32
4. See page 13.
5. See page 25.

the three settlements of Calcutta, Madras and Bombay. The Charter did not expressly specify the law which the new Courts were to administer. The general provisions of the Charter, however, left no doubt that they were expected to administer the English Law. That has been the accepted judicial opinion since the day of the issue of the Charter. Lord Brougham observed in this connection in the Mayor of Lyons v. East India Company,[1] "A Charter or statute, by which courts of justice are constituted, does not necessarily determine the law which they are to administer, but in construing the Charter of George I, there can be no doubt that it was intended that the *English law should be administered as nearly as the circumstances of the* place, and of the inhabitants, should admit. The words, 'give judgment according to justice and right, in suits and pleas between party and party, could have no other reasonable meaning than justice and right, *according to* the *laws of England*, so far as they recognised private rights between party and party."

The Charter of 1726 was uniformly applicable to all the presidency towns and, therefore, the first regular introduction of the English Law in these settlements took place under this Charter. The whole of the Law of England—Common or Statute at that time extant in England was introduced in these towns.

Subsequent to the Charter of 1726, many more Charters were issued by the Crown at various times establishing Courts in the presidency towns. The Charters of 1753, 1774 were some of them. Did or did not these subsequent Charters re-introduce the English Law in these settlements? This has been a very common question. As a matter of legal theory there is nothing to suppose that the English Law was not re-introduced by these Charters. The Charter of 1753 which re-established the Mayors' Courts was as much a legislative Act as the Charter of 1726. If the latter introduced the

1. See M.I.A., 272.

English law, there is no reason why the former should not have done the same.

But the later judicial opinion on this point has been somewhat different. The Charter of 1726 is regarded as being the first and the last to introduce the English Law in the presidency towns. It is a well recognised doctrine, and one which has been acted upon by the Courts for such a long time. The English Law came to be introduced by the Charter of 1726, and it was not re-introduced subsequently. The origin of this rule is lost in oblivion. But it can be said that the rule took a definite shape only after 1776[1]. Sir Edward Hyde East, formerly Chief Justice of the Supreme Court, while giving evidence before the Select Committee of the House of Lords, which was collecting evidence preparatory to the passage of the Charter Act of 1833, presented a paper in which he said, 'It is proper to remind the Government that notwithstanding the Act of 1773 and King's Charter of 1774 granted under it.....the inhabitants of Calcutta.....have not the full benefit of the Statute Law of England of a later period than the 13th year of George I, *unless expressly named.* This has been the *uniform construction* of the Judges of the Supreme Court since its institution; and *whether right or wrong* originally the Judges of the present day cannot depart from it without authority of the Parliament'.

'The period at which the general statute law stops in regard to this presidency is that of the constitution of the Mayor's Court in Calcutta; when those who established that construction said that British law was then first given to this as a British Colony, and as a rule it could not be included in any subsequent statute unless expressly named'.

Sir East continued, 'Thus by a mere technical rule of *doubtful application* and extent the population of Calcutta had been deprived of the benefits of British legislation, no other legislation having been substituted for it. It is difficult to understand as to why the Charters of the Supreme Court

1. Trial of Raja Nandkumar, page 96.

which were obviously meant to extend the Criminal Law of England, as it then stood, to Calcutta, cannot be given that force on the principle of the legislative authority of the Crown in conquered territory'.

Similar is the position of the other presidency towns in this respect.

The English Law, Common as well as Statute as extant in England in 1726, was introduced into the three settlements. It was not, however, the whole of the English Law that was so introduced, but only so much of it as *suited the conditions of India*. The settlements were inhabited by Natives as well Europeans. All of them were placed under the obligatory force of the English Law of 1726. There was much in this Law which had an application only in the context of the peculiar circumstances of England. To apply the law which punished marrying a second wife whilst the first is living, to a people amonst whom polygamy was a recognised institution, would have been monstrous, and, accordingly, it was not applied. In like manner, the law, which in England punished as a heinous offence, the carnal knowledge of a female, under ten years of age, could not, with propriety, be applied to a country where early marriage was in vogue. It, therefore, came to be early recognised that only so much of the English Law was introduced into these settlements as was suitable to the peculiar circumstances prevailing there. It was necessary while applying the Law of England to the non-Christian Natives, Mohammedans and Hindus, to subject it to some such qualification without which the indiscriminate execution of the law would have been attended with intolerable injustice and cruelty.

Two cases decided by the Judicial Committee of the Privy Council put the matter beyond any shadow of doubt. In Mayor of Lyons v. the East India Company[1], the question arose whether the rule of the English Law which incapacitated

1. 1 M. I. A., 272

aliens from holding land, was ever introduced into Calcutta. The Privy Council replied in the negative. The provisions in question were held to be *manifestly inapplicable* to the circumstances of the s ttlement.

In Advocate General of Bengal V. Rani Surnomoyee Dassee,[1] the Privy Council had to consider the question of the applicability to Calcutta of that rule of the English Law which prescribed forfeiture and attachment of personal property of a person committing suicide in England. The Privy Council again replied in the negative so far as the applicability of the rule to the Hindus and the Muslims was concerned. 'Supposing, however, the law of forfeiture of goods of *felo de se*, to have been introduced in India, and being applicable to Europeans, it does not apply to Hindus and other Natives, by whom, in many cases, self destruction is considered not merely legal, but even torious', was the verdict of Lord Kingsdown, who happened to merideliver the decision of the Judicial Committee.

UNCERTAINTY OF THE LAW

The principle, that the law as existing in England in 1726, so far as it was suitable to the local circumstances, was in force in Calcutta, Madras and Bombay, gave rise to great confusion and uncertainty of the law in these places. There were about 732 Statutes passed by the British Parliament before 1726. It was a difficult question to answer as to which of these were applicable and which not.

Under the qualification 'applicable to local circumstances', a large number of these Statutes were obviously excluded. For example, all the Statutes dealing with the subjects of Avowdsons, Bankruptcy, Bastardy, Clergy, Commons, Dilapidations, Elections, Excise, Forests, Police, Poor relief, Sewers, Tithes and the qualifications for sheriffs were clearly framed with reference to the special conditions of England, and so could not be deemed as being applicable to the territories under consideration. But, beyond them, it was a question of

1. 9 M. I. A., 386.

doubt and difficulty whether a particular Statute was so applicable or not and could only be decided by the Court, which could not be expected to perform such a function satisfactorily ; and thus the whole situation was *confusing and chaotic*. In the first place, the Judges made such declarations only in the few case swhich came before them ; in the second place, their decisions were not always reported ; thirdly, the rulings differed from Court to Court ; in the fourth place, the rulings of one Court were not binding on the other ; and lastly, it was not always certain that the rulings and declarations of the Courts in all cases were right. In many cases the rulings of the High Courts came to be reversed by the Privy Council.

Even in cases where a Statute operated in the presidency towns, it was not always clear whether it applied to all the inhabitants there or only to the Europeans. An example in point was the Statute of Elizabeth relating to fraudulent conveyances. In Calcutta it was held to be applicable to all, Natives as well as Europeans. In Madras, it appeared to be the opinion that it applied only to the British Subjects other than the Hindus or the Mohammedans.[1]

The result was a great amount of uncertainty as to the Statute Law in force in the presidency towns. There was great confusion, for example, regarding the Statutes relating to maintenance and champerty. There was great variation of judicial opinion on this point. The question could be finally resolved only by the Privy Council, which in Ramcoomar V. Chandercanto[1] held that the English Statutes on the subject were passed in early times, mainly to prohibit high judicial officers and officers of State from oppressing the King's subjects by maintaining suits or purchasing rights in litigation. They were laws of a special character, directed against abuses prevalent in England in early times. Unless they were plainly appropriate to the condition of things in the presidency towns of India, they could not be held to be applicable to those places. The Privy Council came to the conclusion that those

1. 6 M. H. C. R. 474.

Statutes were not applicable to those places, as the presidency towns were inhabited by various classes of people and the matters of contract and dealing between party and party were determined in the case of Hindus and Mohammedans by their own laws and usages respectively.

Such doubts and difficulties could only be removed effectively by the Indian Legislature which could declare authoritatively as to which of these multitude of Statutes were applicable. But for a very long time, the Legislature in India was inactive in this respect. In 1875, Whitley Stokes sought to prepare a digest of all such Statutes which could br regarded as being applicable to the presidency towns; pointing out the difficulty of the situation he suggested, that the Legislature, in consultation with the Judges of the High Courts, should declare as to which of the Statutes passed before 1726 were to be operative in the presidency towns. Out of 732, Stokes selected about 75 Statutes, some of which certainly, others probably, and the rest possibly were so applicable.[1]

The great confusion in the legal system continued to prevail for long. But then a movement for the codification of laws started which did away with much of the confusion.

STATUTES AFTER 1726

There was somewhat less difficulty about the applicability to the presidency towns of the Statutes passed in England after 1726. They could not be so applied automatically. Only those of them which were *expressly made applicable* to India, or which extended to India by *necessary implication*, could be regarded as being operative here.

Some doubts arose in this region due to another factor. Most of the Statutes in force in England in the year 1726 were repealed by Parliamentary Statutes of which only a few applied expressly to India. The question often arose whether some of these repealing Acts were applicable to India also even

1. A Collection of Statutes relating to India, preface to the 1st edition.

though they were not expressly so applied. Could a modern Statute of Parliament amending an ancient Statute in force in India extend to India by necessary implication? For example, the Habeas Corpus Act (31 Car. II c. 2) applied to the presidency towns; but did the amending Act, 56 Geo. III c. 100, apply also? In Reg. v Vaugham, 5 Beng. 429, Phear J. asserted that it did not; but Mr. Anstey, in Ameerkhan's Case 6 Beng. 418) contended that it did. Such confusion continued to disfigure the Indian Legal System for long. Only the process of codification improved the matters.

NATIVES IN THE PRESIDENCY TOWNS

The presidency towns were inhabited not only by the British subjects, but also by large numbers of Hindus and Muslims. The Mayors' Courts established in 1726 were the Courts of the English Law and this Charter, as we have already seen, introduced the English Law into the three Presidencies. Thus arose, in an acute form, the problem whether the civil law of England was to be applied to the Indians also.[1]

The Charter of 1726 came to be modified in 1753.[2] At this time it was expressly provided that the Mayors' Courts were not to try actions between Indians, such actions being left to be determined among themselves unless both parties, by consent, submitted the same for determination by the Mayor's Court. This provision appears to be the *first reservation* of their own laws and customs to the Indians.

In 1774, the Mayor's Court at Calcutta was superseded by the Supreme Court. The Act of 1773 and the Charter of 1774 were silent as to the law that the Supreme Court was to apply to the Indians. But there is evidence to show that the new Court was not minded to disregard Native Laws regarding Marriage and Succession. In the Patna Cause we find the Court applying the Mohammedan Law of Succession.[3]

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1. See page, 47.
2. See page, 48.
3. See page, 100.

However, to put the matters beyond any shadow of doubt, the Act of Settlement in 1781 in section 17 directed that the questions of Inheritance and Succession, and all matters of Contract and dealing between party and party should be determined in the case of Mohammedans and Hindus by their respective laws, and where only one of the parties should be a Mohammedan or Hindu 'by the laws and usages of the defendant'.[1]

This provision, in the view of Ilbert, 'constitutes the first express recognition of the Warren Hastings' rule in the English Statute law'. The Calcutta rule of 1781 was extended to other Presidencies in due course when they came to have the Recorders' Courts and thereafter the Supreme Courts.

Section 17 of the Act of 1781 had reserved the indigenous personal laws of the Hindus and the Mohammedans only in two cases—Inheritance and Contract. The Supreme Court at Calcutta, however, interpreted it, not in a literal but in a liberal manner. The application of their personal laws was not restricted only to the two titles specifically mentioned. The Hindus and the Muslims were given the benefit of their laws and customs in all family and religious matters.

Madras and Bombay stood on parallel lines.

CHRISTIANS, PARSEES ETC.

The presidency towns also contained several other classes of persons like Armenians, Portuguese, Christians, Jews, Anglo-Indians and Parsees etc. The Supreme Courts applied to these persons the English Law, as no reservation of any kind had been made in their case.

LAW IN THE MOFUSSIL

The first and the foremost measure which introduced a system of law in the mofussil of Bengal, Bihar and Orrissa was Article XXXIII of the Warren Hastings' plan of 1772. It provided 'In suits regarding inheritance, marriage,

1. See page, 115.

caste, and other religious institutions, the laws of the Koran, with respect to Mohammadans, and those of the Shaster with respect to Gentoo, shall be invariably adhered to ; on all such occasions the Maulvies or Brahmins shall respectively attend to expound the law, and they shall sign the report, and assist in passing decree'.

The plan of Warren Hastings provided no specific directions for any suits other than those expressly mentioned. To cover such cases, Sir Elijah Impey in 1781 as the Judge of the Sadar Diwani Adalat, prescribed 'that in all cases, for which no specific directions are hereby given, the Judges of the Sadar Diwani Adalat to act according to justice, equity and good conscience'. A similar rule was made applicable to the Mofussil Diwani Adalats in Bengal, Bihar and Orissa.

For nearly one hundred years the two rules—those of Hastings and Impey—regulated the question of the substantive law to be applied by the Adalats in discharge of their judicial functions. No law had been prescribed in a large majority of cases ; the Courts had a discretion in such matters. The result of this circumstance was the growth of a legal system which was haphazard, uncertain and incoherent. The Legislature could have done something to improve matters, but, during the whole of this long period it was singularly inactive so far as the question of substantive law was concerned.

The process of codification, that is the enunciation of the law in simple, certain and definite language started from 1833 and gained momentum after 1853. To appreciate the value of this process it is necessary, firstly, to notice the way the law developed in the country, and secondly, to have an idea of the condition of the legal system existing on the eve of the Charter Act of 1833 which was responsible for the initiation of the process of codification of laws in India.

ENGLISH LAW NOT INTRODUCED

The scheme which Hastings introduced did not amount to a good system of laws. Hastings himself realized that *greatly*

to be desired was 'a well digested code of laws compiled agreeably to the laws and tenets of Mohammadans and Gentoos'. But he also realized that with the resources at his command such a perfect system of laws was out of the question. The defects in this early scheme—and they were many—were thus inevitable, which only the passage of time could remove.

Before proceeding to take note of these defects, one sterling merit of the scheme may be mentioned here. Hastings had claimed that his plan was 'adapted to the manners and understandings of the people and exigencies of the country, adhering as closely as possible to their ancient usages and institutions'. This was true to a great extent. In the first place, Indians had been given the advantage of their own indigenous system of law in all their family affairs. In the second place, the English Law was not introduced in the Mofussil.

There were many who championed the cause of English Law. In their opinion it was absolutely necessary for the peace and prosperity of the country that the laws of England should be introduced into the Mofussil. Some advocated this course because in their opinion such a measure was calculated to preserve that influence which the conquerors must possess to retain their power. But Hastings *did not agree* with this opinion. He believed it to be of great importance, and a very essential point of civil liberty for a nation that so far as possible its own laws should be preserved to it 'Even the most injudicious or most fanciful customs which ignorance or superstition may have introduced among them, are perhaps *preferable* to any which could be substituted in their room', was the conviction of Hastings.

It was fortunate that at this time of transition when there was a strong inducement to introduce *wholesale* the English Law into India, there was a person like Hastings at the helm of affairs. An indiscriminate introduction of the English Law in the Mofussil would have been a major calamity. The genius of the Indian people, their notions, customs, manners. social structure and environments radically differed from those of the

English. The Indians did not understand the English language, institutions or laws. Apart from this, perhaps the greatest objection against introduction of the English Law was its great technicality at the time. It had developed under circumstances peculiar to England. The English Law of property had developed against the background of a *feudal society*. Many English jurists called the English system as complex. English Statesmen have called it as unintelligible. Ilbert has described the English Law of eighteenth century as 'unregenerate English Law, insular, technical, formless, tampered in its application to English circumstances by the quibbles of the judges, capable or being an instrument of the most monstrous injustice when administered in an atmosphere different from that in which it had grown up'.

If the Hastings' scheme had no other merit it had this at least that it did not introduce the English Law in its complex and unregenerate state into India. As time passed on, the Indian Administrators came to appreciate more and more the unsuitability of the unmodified English Law to the circumstances of India. Harrington writing in 1805, may be taken as representing this view of the Administrators when he said, 'The fixed habits, manners and prejudices and the long established customs of the people of India, formed under the spirit and administration of arbitrary government, totally opposite in principle and practice to that of England, would not admit of a more general application of British laws to the inhabitants of the country ; who are not only ignorant of the language in which those laws are written, but could not possibly acquire a knowledge of our complex, though excellent, system of municipal law...'

SCHEME OF THE LAW APPLIED IN THE MOFUSSIL

The scheme of the law applied by the Courts in the mofussil of Bengal, Bihar and Orissa was as follows :

1. The Acts of the Parliament had *over-riding authority*. Therefore, those Acts of the Parliament which extended to India, either expressly or by necessary implication, had to be

observed by all the Courts in the land. Such Acts dealing with any branch of the substantive law were only very few.

2. Regulations of the Government were applied before 1833 ; after that date, the Acts enacted by the Legislative Council of India had to be applied.

3. Hindu Law was applied in all suits among the Hindus in cases regarding succession, inheritance, marriage, caste and other religious institutions.

4. Mohammedan Law was applied in similar suits among the Mohammedans.

5. On all other points the Courts had to act according to justice, equity and good conscience.

The scheme of things was laid down by Warren Hastings in 1772, as also by the Regulations of the Government enacted due to the initiative of Impey in 1781.

The Courts in Madras were enjoined to follow a similar scheme by Regulation III of 1802.

In Bombay the scheme was slightly different. First, the Acts of the Parliament were applied ; second came the Regulations of the Government. Thereafter, the usage of the country in which the suit arose was to be applied ; if there was none, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience was to be applied. This was the result of section 26 of Regulation IV of the Elphinstone Code of 1827.

The result of the operation of these schemes was very unfortunate on the development of the law in India. The legal system as it developed could be damned 'loudly and long for its lack of completeness, uniformity and certainty'. The reasons for such a state of affairs *inter alia* were, the incoherent and complicated system of the *Regulation Law*, and the operation of the rule of justice, equity and good conscience.

REGULATION LAW

It has already been described in the previous pages as to how the Regulating Act conferred a limited power of legislation on the Bengal Government, how it came to be extended in 1781[1] by the Act of Settlement and how Lord Cornwallis by enacting his famous Regulation—Regulation XLI of 1793—tried to improve legislative forms and methods. The history of the development of the Regulation Law in India may be said to have begun from the year 1793.[2]

In 1797, the British Parliament put its seal of approval on the legislative methods and forms announced by Cornwallis through the Regulation XLI of 1793. The most of what the Act[3] of the Parliament said had been adopted *verbatim* from the famous Regulation. The Act recited that various Regulations for the better administration of justice among the inhabitants and others within the provinces of Bengal, Bihar and Orissa had from time to time been framed by the Governor General in Council in Bengal; that it had been established and declared as essential to the future prosperity of the British territories in Bengal, that all Regulations passed by the Government, affecting the rights, properties, or persons of the subjects should be formed into a regular Code, and printed with translations in the country languages; that the grounds of every Regulation be prefixed to it; and that the Courts of justice within the Provinces be bound to regulate their decisions by the rules and ordinances which such Regulations might contain. It was essential that so wise and salutary a provision should be strictly observed, and that it should not be in the power of the Governor General in Council to neglect or dispense with the same.

Accordingly, the Act enacted that all Regulations which might be issued and framed by the Governor General in

1. Chapter VII.
2. See page 189.
3. 37 Geo. III, c. 142. sec. VIII.

Council at Fort William in Bengal, affecting the rights, persons, or property of the Natives or of any other individuals who might be amenable to the Courts of Justice, should be registered in the Judicial Department, formed into a *regular Code*, printed with translations in the country languages, and that the grounds of each Regulation should be prefixed to it. All the Courts of Judicature in the Mofussil were to be bound by, and were to regulate their decisions by, such rules and ordinances as were contained in the Regulations. Copies of the Regulations passed every year were to be transmitted to the Court of Directors of the Company as also to the Board of Commissioners for the affairs of India.

The Act of 1797 was an important piece of legislation in many respects. It laid down the essential ingredients that a Regulation was to contain. It recognised and confirmed the legislative power of the Governor General in Council at Fort William to be exercised independently of the Supreme Court. Regulations thus made were to be binding on the Courts of the Company in the Mofussil. It made it necessary for the Governor General in Council to formulate all the Regulations into Codes, and to print and publish them in the languages of the country and thus provisions were made for acquainting the people, as far as was possible at that time, with the laws which were to govern them. The Act also sought to put the legislative power of the Government under control. A formal publication, a written record of reasons for enacting the particular Regulation, and official communication of the Regulations to the authorities in England were deemed to be necessary expedients for placing a check on any hasty exercise of the legislative power.[1]

BANARAS

The year 1800 saw the extension of the legislative power of the Governor General in Council to Banaras. This was effected by section XX of 39 and 40 Geo. III. c. 79. It recited that whereas the province or district of Banaras had been ceded to

1. Cowell.....70.

the Company, and been annexed to the Presidency of Fort William in Bengal; and whereas the said province, and all other provinces or districts 'which may hereafter be at any time annexed and made subject to the said Presidency, should be subject to such Regulations as the Governor General and Council of Fort William aforesaid have framed or may frame for the better administration of justice among the Native inhabitants and others within the same respectively'. It was, accordingly, enacted, that from and after the first day of March in 1801, all such Regulations 'as have been or may be hereafter, according to the powers and authorities, and subject to the provisions and restrictions before enacted framed and provided, shall extend to and over the said province or district of Banaras, and to and over all the factories, districts, and places, which now are or hereafter shall be made subordinate thereto, and to and over all such provinces and districts as may at any time hereafter be annexed and made subject to the said Presidency of Fort William.'

MADRAS

In 1800, Parliament extended these legislative provisions to Madras, too, by Act 39 and 40 Geo. III. c. 79, section XI. As in Bengal, political events in Madras made such a grant *inevitable*. The Governor and Council of Fort St. George at Madras were, within the territories subject to their Government, vested with the same legislative powers as had been conferred previously on the Government of Bengal. The Government of Madras became entitled to frame Regulations for the Mofussil Courts within their territories in the same manner as the Government at Fort William in Bengal. Before the passage of this Act, the Governor and Council at Fort St. George could make rules and ordinances under the very restricted powers conferred on them by the Charter of 1753 for the presidency town of Madras. But in course of time, the territorial acquisitions of the Madras Government had become very substantial. The Government, therefore, needed a legislative power for these territories and it was conferred on it in 1800.

The process of codifying the Regulation Law was initiated by Regulation I of 1802 which ordered the formation of a regular Code according to the plan adopted in Bengal in the Regulation XLI of 1793.

BOMBAY

Bombay was the last to receive the powers of legislation. The Act, 47 Geo. III. c. 68, by s. 3, passed in the year 1807, conferred on the Government of Bombay the same powers of legislation for territories under their authority as other Governments enjoyed.

PRESIDENCY TOWNS OF MADRAS AND BOMBAY

The Regulating Act of 1773 had conferred on the Governor General in Council powers to make laws for the Presidency of Fort William, subject to such laws being *registered* in the Supreme Court of Judicature. Such laws had to be reasonable and not contrary to the laws of England. This power of the Bengal Government remained undisturbed for long in subsequent years.

The Governments of Madras and Bombay, on the other hand, had powers of legislation granted to them for the respective settlements by the Charter of 1726 and repeated in the charter of 1753. Under these powers the Government could frame laws and rules for the settlement subject to certain restrictions.[1] To introduce *uniformity* in the system of making laws for the three presidency towns it was thought expedient in course of time to grant to the Governors and Councils of Bombay and Madras the *same powers of government* as were vested in the Governor General in Council for the government of Fort William. In 1807,47 Geo. 68, s. 1 accordingly empowered them to make and issue such rules and regulations for the good order and civil government of the towns of Madras and Bombay as the Governor General in Council might make for the good order and civil government of Fort William. Such laws had to be registered in the Supreme Court of

1. See page 41.

Madras and the Recorder's Court at Bombay. All other restrictions which existed in the case of the Governor General in Council in this respect had to be observed by the Governments of Bombay and Madras also.

THREE LEGISLATURES

At the close of 1807 a uniform system of legislation prevailed in the three Presidencies. Each Presidency was self contained as far as the making of laws was concerned. The three Governments stood on the same level in this respect. The Governor General in Council did not exercise any direct authority over the Governors in Council at Madras and Bombay in the matter of making laws.

Each of the three governments had a *dual* power to make laws. It could make laws for the presidency towns under its jurisdiction. These laws had to be registered with the Crown's Court functioning there. The laws had to be just and reasonable. They could not be repugnant to the laws of England. The King in Council, either spontaneously or on representations, might cancel any of such laws.

Further, each of the three Governments had powers to frame Regulations for the territories subject to its control. The Courts in the Mofussil had to observe them. They were not subject to the restrictions existing in the case of laws made for the presidency towns. These Regulations had to be formulated into a regular Code by the Government. The Regulations had to be printed and published in the languages of the country.

Each Government had separate and identical powers of legislation within its territories. Madras and Bombay, though subordinate, could pass Regulations independently of Calcutta. They were, however, required to send a copy of each of their Regulations to the Governor General in Council, though not necessarily for its approval.

Under the authority of this arrangement each Government passed a number of Regulations which were compiled into Codes for each Presidency. The Bengal Code started

from 1793 ; the Madras Code began from 1802. The Bombay Code took shape from the Mountstuart Elphinstone Code of 1827, when all the previous Regulations were abrogated and new Regulations passed instead were compiled into a Code.

CHARTER ACT OF 1813

The Charter Act of 1813, 53 Geo. III. c. 155, made two alterations in the field of legislative powers of the various Governments in India. In the first place, the legislative powers conferred on them were brought under a stricter control of the Parliament. Section 66 of the Act laid down that copies of all the Regulations made by the several Governments in India under the authority of the Acts of Parliament (37 Geo. III, c. 142, 39 & 40 Geo. III. c. 79, and 47 Geo. III, c. 68) should be laid annually before the Parliament.

In the second place, the Act of 1813 extended further the scope of legislative powers of the several Governments. All such Regulations were to apply to all persons proceeding to India within the limits of the Company's Government. The several Governments, secured the powers of taxation, to make articles of war and to levy customs.

SYSTEM OF REGULATION LAW-MERITS AND DEMERITS

For nearly three decades the three Governments in India were engaged in framing Ragulations for the territories under their control. A huge mass of Regulation Law was thus created. In Bengal alone not less than 675 Regulations, many of them containing over one hundred sections, were passed.

The Regulations deal with a variety of subjects. Their main object was procedure and current legislation, that is, such measures as were necessary to meet particular cases. They established Civil and Criminal Courts. They prescribed the procedure which these Courts were to follow. They dealt with Police, Revenue, Customs, Excise, Salt, Opium, Coins and so forth. But these Regulations did not touch—or touched very vaguely or generally—*the field of substantive law* that the established Courts of Justice were to administer. They did

not touch the *personal law* of the Hindus or the Muslims. They did not lay down any law of Contracts or Torts. Thus vast gaps and blanks were left unfilled in the substantive law of the country.

The most interesting part of these Regulations is the portion, known as 'Preamble', which was attached to each one of the Regulations and in which reasons for the enactment of that particular Regulation were stated.[1] It is thus possible to have an idea of the growth and development of the various phases of administration. The Regulations furnish the best material for studying the methods of administration, or rather experiments in government during those early days of the British Government in India. The Regulations throw a flood of light on the social, political and economic conditions obtaining in India at the time and from this point of view the value of the Regulations is very great even to-day.

The Regulations fulfilled a great want in the times they were framed. The Regulations were framed, modified and abrogated, according to the peculiar circumstances of time and place and the exigencies of the situation.

But the system of Regulation Law was not perfect. In the words of Rankin they had 'many defects in point of substance and few merits in point of form'. The process of gradually building up the law rendered the whole mass of Regulation Law into an *incongruous* complicated and undigested mass; intricate to study and difficult to comprehend. They were passed without any long term view or thoughtful planning. They were mostly in the nature of temporary expedients adopted by the Government to meet some pressing problem of the day. 'The tentative amendments, the partial and imperfect solutions, the makeshift devices which constitute a gradual process of improvement were in the circumstances of the time and of the country a true method of progress and in general the only method which would work. But the results of such a processs are almost necessarily defective.'

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1. See page 189, Corwallis' emphasis on Preamble for each Regulation.

The Regulations were often *badly drafted*. They had been drawn by inexperienced persons with little skilled advice. Frequently, they were conflicting with each other.

A very prominent defect in the system of Regulation Law was its great uncertainty. The facility with which the Regulations could be made or unmade, prompted the Authorities to tamper with them at their sweet will and pleasure. The Regulations were changed so frequently that it was scarcely possible to recollect whether any particular law was in force or had been repealed. Changed one year, abrogated next year and reintroduced third year the cycle went on presenting an example of fickleness in the presiding power, and imposing great confusion and chaos in the law, making it difficult to understand.

The greatest defect in the system of Regulation Law was the existence of three parallel systems created by three Governments having coordinate authority to enact Regulations. There was *no uniformity* in the system. The Regulations at Bombay might be divergently different from those in Bengal though dealing with the same points. The Regulations passed by one Government were often in conflict with those passed by the other. *Discrepant* laws existed in different parts of India. Thus for example, in Bengal serious forgeries were punishable with double the term of imprisonement provided for *perjury*; in Bombay perjury was punishable with double the imprisonment provided for the most aggravated forgeries; while in Madras, two offences were excatly on the same footing, in Bombay the escape of a convict was punishable with double the imprisonment assigned for it in either of the other Presidencies, while coining was punishable with little more than half what the other Presidencies assigned. Whitley Stokes summed up the whole position tersely thus: 'The Anglo-Indian Regulations, made by these different legislatures, contained widely different provisions, many of which were amazingly unwise'.[1]

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1. Anglo-Indian Codes 1..2

Lord Bryce speaks of their work as having been done 'in a very *haphazard* fashion'.

The system of Regulation Law thus suffered from an inherent *weakness*. It was creating *diversity* where uniformity would have been the better principle. Diverse laws had grown under it. Its bulk had unnessarily been bloated for even on topics of common interest to all the Governments there necessarily existed three Regulations, when one passed by some central authority would have met the exigenies of the situation.

JUSTICE, EQUITY AND GOOD CONSCIENCE

The plan of Hastings laid down specifically the law to be applied by the Courts only for a few topics, viz. Inheritance, Marriage, Caste, and other religious usages and institutions. These topics did not exhaust the whole scope of litigation with which the Courts were usually confronted. No specific direction and no sufficient guidance had been given, either by Hastings' plan or by later Regulations, regarding the law that the Courts were to apply to other heads of litigation. There was thus a serious gap. In this vacuum the Courts were to act according to justice, equity and good conscience[1]. The maxim of justice, equity and good conscience did not mean anything else but the 'discretion of the Judge'. There was no specified way in which the Judges could exercise their discretion. The Judges had full liberty to decide the causes before them in a way which appeared to them to do substantial justice between the parties.

The obvious result of such a state of affairs was confusion and uncertainty in the system of laws of the country. Discretion of one Judge differed from that of another. The notions of equity, justice and fairplay differed from Judge to Judge. No one thus knew as to what were the principles to be applied to any particular case.

The Judges on whom devolved the duty of administering

1. See Impey's Scheme of 1781, p. 137.

justice in the initial era of the Company's administration of India, were lay persons who had no training in any system of law. They were Englishmen who had been provided with the assistance of Native Law Officers—the Kazis and the Pundits—who used to guide them in the adjudication of questions relating to the personal laws of the Hindus and the Mohammedans. A practice thus appears to have originated in the Courts under which they applied the Hindu and the Mohammedan Laws, as the case might be, even in those cases in which they were not bound to administer justice according to those laws, but had to act according to their discretion. To exercise discretion in this way was simple as well as consonant with the general tenor of the whole scheme. The Native Law Officers were available near at hand and the lay Judges could very easily ascertain the principles covering these cases. Thus in maters of Contract and such other matters the Hindu and the Mohammadan Laws came to be applied. It was in this way that the Muslim Law of Gifts and Pre-emption came to be applied by the Courts.

Another probable source from where the Courts could borrow the principles for deciding cases which they had to decide according to their discretion, was contained in the customs prevailing in the country. In the absence of any specific direction or any guidance from any other more authoritative source, it was proper for the Courts to look to the customs of the parties, place, family, community, tribe or class as might be available to them.

After the advent of the High Courts in India, the Courts began to give a somewhat new meaning to the phrase 'justice, equity and good conscience.'

The High Courts and the Lower Courts came to consist of the English Judges trained in the system of the English Law. Whenever they came across a point which they were directed to decide according to justice, equity and good conscience the Judges invariably began to base their decisions on the rules of the English Law. Not only those principles of the English Law

which suited the conditions in India, but even those technical rules which were peculiar of the English Law came to be thus applied to India. The High Courts and even the Privy Council encouraged this process. They very specially laid down that justice, equity and good conscience means nothing else but the rule of English Law.

In Varden Seth Sam V. Luckpathy,[1] the highest Court of appeal, the Privy Council gave it as its opinion that although the English Law was not obligatory upon the Courts in the Mofussil, they ought, in proceeding according to justice, equity and good conscience, to be governed by the principles of the English Law, applicable to a similar state of circumstances.

'Now, having to administer justice, equity and good conscience' says Sir Barmes Peacock[2] 'where are we to look for the principles which are to guide us? We must go to other countries where equity and justice are administered upon principles which have been the growth of ages, and see how the courts act under similar circumstances; and if we find that the rules which they have laid down are in accordance with the true principles of equity, we cannot do wrong in following them.' 'Though justice, equity and good conscience' says Sir James Stephen[3] 'are the law which Indian Judges are bound to administer, they do in point of fact resort to English law books for their guidance on questions of this sort, and it is impossible that they should do otherwise, unless they are furnished with some such specific rules as this Act (Contract Act) will supply them with'. In Waghela V. Sehkh Masludin[4] their Lordships of the Judicial Committee remarked that 'equity and good conscience' had been 'generally interpreted to mean the rules of English law if found applicable to Indian

1. 9 M. I. A; 303.
2. Saroop V. Troyla khonath (1868) 9 W. R. 230, 232. See also Brojo V. Rama Nath (1897) 24 C. 908, 930.
3. Supplement to the Gazette of India, May 4, 1872 p. 535.
4. (1887) 14 I. A. 89, 96 see also Dada v. Babaji (1868) 2 Bom. H. C. R. 36, 38; Webb v. Lester (1865) 2 Bom. H. C. R. 52, 56.

Society and circumstances.' The Judges in deciding cases by this maxim, decided them by the rules of English Law and thus many rules contrary to the genius, customs, habits and institutions of the Indians, indirectly found their way to India. In course of time it was found necessary to check the introduction of such technical rules of the English Law. 'The only way of checking this process of borrowing English rules from the recognised English authorities is by substituting for those rules a system of codified law, adjusted to the best Native customs and to the ascertained interest of the country'.[1]

A system of law which depends for its exposition on case-law can scarcely be satisfactory. The reason is obvious. A host of points will necessarily be left unsettled under such a system till the highest tribunals have had an opportunity to adjudicate them. When they have decided their judgements are very likely to differ as the Judicial Officers are frequently influenced by their own fads or fancies. The evils of the divergence of views have a tendency to increase and not diminish. As the conflicting precedents go on accumulating, the task of ascertaining the law applicable to a particular case becomes proportionately more and more difficult ; and when the right to appeal is allowed to two or more courts, the uncertainty becomes so overwhelming as to necessarily entail great embarrassment to the course of proper administration of justice, besides involving extra expense and delay in litigation. 'Well-designed legistation' says Sir James Stephen[2] 'is the only possible remedy against quibbles and chicanery. All the evils which are dreaded.....from legal practitioners can be averted in this manner and in no other. To try to avert them by leaving the law undefined, and by entrusting Judges with a wide discretion, is to try to put out the fire by pouring oil upon it. Leave a Judge with no rule, or with one of those leaden rules which can be twisted in any direction, and you at once open to the advocate every sort of topic by which the discretion of the

1. Despatch from Lord Salisbury (the then S. S. for India) to the Govt. of India. Dated the 20th Jan. 1876.

2. Gazette of India supplement, May 4, 1872 p. 529.

judge can be guided. Shut the lawyers' mouth, and you fall into the evils of arbitrary government.'

Communities other than Hindus and Muslims in the Mofussil.

Hastings' rule prescribing the Hindu and the Mohammedan Laws to the Hindus and the Mohammedans respectively in certain types of cases was of a very restricted nature. There was no specific rule of law for many other types of persons except the general direction to the Courts to act in such cases according to *justice, equity and good conscience.*

The country was inhabited by various communities other than the Hindus and the Muslims. There were European British subjects, Anglo-Indians, Armenians, Parsees, French and Portuguese residing in the Mofussil. Another important class consisted of the Native Christians. Jews also constituted a separate community. For all such communities no specific system of law had been prescribed for the Courts in the Mofussil. Faced with the direction to administer justice among these people according to their discretion, the Courts of the Company developed the practice of applying to them the law of the country of the origin of the parties. In the case of indigenous population like the Native Christians the Courts applied the customs prevailing among them. To apply personal laws to these parties in the same way as was done in the case of Hindus and Mohammedans appeared to be the best solution to the Courts and also in accordance with justice and equity. Thus in accordance with this practice, the Sadar Diwani Adalat decided a question of succession among the French in accordance with the French Law.[1] Questions of inheritance among the Portuguese were decided with the help of the Portuguese Law.[2] Armenian Law was administered when the parties before the Court happened to be Armenians.[3] Questions of inheritance, succession and marriage among the Parsees were

1. Durand v. Boilard 5 Ben. Sad. Rep. 176.
2. Joanna Fernandez v. Domigo de Silva 2 Ben. Sad. Rep. 227.
3. Aratoon v. Aratoon Indian Decisions (Old Series) VIII, 469.

regulated according to the Parsee Law.[1] The Jewish Law was administered to the Jews.[2]

Another important category of persons for whom no law had been prescribed were the East Indians—descendants of a European and a Native, or half caste. These persons followed in all things the usages and the customs of the English residents in India. In the common bond of union in religion, customs, and manners, the East Indians approached the class of British subjects. On the basis of justice, equity and good conscience the Company's Courts administered to these persons the English Law. This course evidently was a *just and proper* exercise of the discretion entrusted to the Courts. Elucidating the point, the Privy Council in the leading case of Abraham v. Abraham observed, 'The English Law, as such, is not the law of those Courts. They have, properly speaking, *no obligatory law of the forum,* as the Supreme Courts had. The East Indians could not claim the English Law as of right; but they were a class most nearly resembling the English, they conformed to them in religion, manners and customs, and the English Law as to the succession of movables was applied by the Courts in the Mofussil to the succession of the property of this class.'[3]

Courts applied the English Law to the European British subjects residing in the Mofussil.

The position of the Indian Christians was very *typical.* No law had been specifically prescribed for them. These persons originally belonged either to the Hindu or the Mohammedan stock and thence they became converted. Questions of inheritance etc. arising among them were usually decided on a consideration of 'the usage of persons situated as the parties who are described as Christians whose ancestors are of Hindu stock, and the usage in their particular family as indicated by the acts of the parties and their predecessors, in respect of their property since they have belonged to the Christian community'. The reasons for the adoption of this rule were these :

1. Modee Kaikhooscrow Hormusjee v. Coover Bhaee 6 M.I.A. 448.
2. Musleah v. Musleah, 1 S. C. R. Ben. 894.
3. 9 M. I. A. 240.

In such cases Courts were to administer justice according to justice, equity and good conscience. There was no *lex loci* and so the rule of law must be according to the customs and usages of the class to which the parties belonged, and the usages in each particular family which could be ascertained by evidence.

These rules applicable to the Indian Christians were elucidated by the Privy Council in the famous case of Abraham v. Abraham. A Hindu became a convert to Christianity ; married an Anglo Indian wife and with her and the children of this marriage he conformed in all respects to the language, dress, manners, and habits of the English persons up to the time of his death. The Sadar Diwani Adalat at Madras applied to him the Hindu Law principle of Coparcenery. The matter came in appeal before the Privy Council. Being the first case in which the question of law applicable to such cases had come to be considered, the Privy Council gave its opinion *in extenso*. The propositions laid down were :

1. As soon as a Hindu became a Christian, he at once became severed from the family. The Hindu Law ceases to have any *continuing obligatory force* upon the convert. He might renounce the old law by which he was bound in the same way as he renounced his old religion, or if he thought fit, he might abide by the old law, notwithstanding he had renounced the old religion.

2. The convert in all those matters with which Christianity has no concern though not bound by the Hindu Law or any other positive law, 'may by the course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom'. Nothing could surely be more just than that the rights and interests in his property, and his powers over it, should be governed by the law which he had adopted or the rules which he had observed.

3. The class of Native Christians had subordinate divisions forming again distinct classes, of which some adhere to the Hindu customs and usages as to property; others retain those customs and usages in a modified form; and others had wholly abandoned those customs and usages and adopted different rules and laws as to their property. The deceased in the particular case belonged to this last category and so the principle of Hindu Law could not be applied to him.

Abraham v. Abraham thus laid down that every case had to be dealt with on its own merits. Evidence alone could establish whether the convert was following the original customs fully, or in a modified form or had completely abandoned them. Then only the case could be decided.

The above discussion would show remarkable confusion that surrounded the principles of law to be applied to those persons who were neither Hindus nor Mohammedans. The Courts tried to ascertain their customs and usages. Tardy and voluminous evidence had to be produced by the parties to establish a particular custom and usage. All this created confusion and delay in the judicial proceedings.

There was no uniformity in the legal system. Each person had his own distinct and separate system of law applicable to him. A very sorry state of affairs existed in British India at the time. 'Five men each under a different law may be found walking or sitting together.' In matters of Inheritance and Succession and personal relations each individual was governed by his own personal law, customs and usages. The First Law Commission commented on the prevailing set up and observed. 'Though British India may appear on the one hand to have less need of a *lex loci* than any other country, because the great mass of its population consists of two sects whose law is contained in their religion, yet on the other hand there is probably no country in the world which contains so many people who, if there is no law of the place, have no law whatever'.

The legal system as it worked was thus very unsystematic, uncertain and unsatisfactory. The Courts had to work under a great strain—greater perhaps than any other Court in the world—as they could be called upon to decide a point of inheritance or succession under any system of Law in the world. They could be called upon to administer any of the systems, Hindu Law, Mohammedan Law, English Law, Jewish Law, Parsee Law, Armenian Law and so on.

Two points may be noted. In the first place, the doctrine of applying personal laws to various classes of persons extended only to a few topics like Marriage, Succession, Inheritance and family relations ; precisely the same topics for which the Courts were bound to administer the Hindu or the Mohammedan Laws to the suitors concerned.

In the second place, there was a fundamental difference in the practices obtaining at the Supreme Courts and the Mofussil Courts. The Supreme Courts were required to administer the Hindu Law and the Mohammedan Law to the Hindus and the Mohammedans respectively in a few topics. They, in all other cases, administered the English Law. In Musleah v. Musleah[1] the Supreme Court at Fort William applied the English Law to the Jews. In Emin v. Emin the same Court applied the English Law to the Armenians. The Supreme Court did not consider itself to be possessing jurisdiction to administer personal laws of the parties, except in the case of Hindus and Mohammedans. In all other cases the Supreme Courts applied the English Law which was regarded as the *lex loci* in the three presidency towns.

In the beginning the number of these persons was not big. The uncertainty in the law therefore did not produce much mischief. With the passage of time India began to attract more and more foreigners. In 1833 it was thrown open to Englishmen. The number of Native Christians also multiplied. No longer could the law be allowed to remain in such a confused state. It was therefore highly desirable to

1. S.C.R. Beng. I 894.

evolve a body of law, simple and certain, which might be applied to all except the Hindus and the Mohammedans in matters of Succession, Inheritance and Marriage. It was necessary to codify the law and when the process of codification of the law started in India, due attention was paid to this aspect of the problem. Codification of laws therefore had a peculiar importance in the context of India where the law was in such a chaotic and confused state.

DEFECTS IN THE SYSTEM OF LAWS

A very dismal picture was thus presented by the system of Laws prevailing in India. In the absence of any specific body of law on many important heads of litigation, the Courts were trying to create a system of law on the basis of the doctrine of justice, equity and good conscience which was at once contradictory and incoherent. There were four Courts of Sadar Diwani Adalats functioning in the country. There were three Supreme Courts established under the Royal Charters. Every one of these tribunals was perfectly independent of the others. Every one of them was at liberty to put its own construction on the law. Under such a system it was natural that there should arise, in the course of a few years, a large collection of cases and decisions diametrically opposed to each other, and, all of equal authority. The law thus was bound to become bulky, uncertain and contradictory.

The existence of five different bodies of Statute Law in force in India was another cause of uncertainty and complicacy. (a) The English Statute Law passed before 1726 and prevailing in the presidency towns. (b) English Statute Law subsequent to 1726 which extended to India expressly or by necessary implication (c) The Regulations of the Governor General in Council commencing with the Cornwallis' Code of 1793. (d) Regulations of the Governor and Council in Madras which commenced from 1802. (e) Regulations of the Bombay Government starting from 1799, or 1827 when all the previous Regulations were rescinded.

The defective system of the Regulation Law, the doctrine

of justice, equity and good conscience, and the absence of fixity of rules of Land applicable to Christians, Jews, Anglo-Indians etc. also created much uncertainity, disuniformity and ambiguity in the law.

The great uncertainty of law was the subject of comment by the Judges of the Supreme Court of Calcutta. In a letter to the Governor General in Council at Calcutta they happened to observe as follows :

'In this state of circumstances, no one can pronounce an opinion or form a judgment, however sound, upon any disputed right of persons respecting which doubt and confusion may not be raised by those who may choose to call it in question ; for very few of the public or persons in office, at home, not even the law officers, can be expected to have so comprehensive and clear a view of the present Indian system, as to know readily and familiarly the bearings of each part of it on the rest. There are English Acts of Parliament specially provided for India, and others of which it is doubtful whether they apply to India wholly, or in part or not at all. There is the English common law and constitution, of which the application, in many respects, is still more obscure and preplexed ; Mahomedan Law and usage ; Hindu Law, usage and scripture ; Charters and Letters Patent of the Crown ; Regulations of the Government, some made declaredly under Acts of Parliament particularly authorizing them, and others which are founded, as some say, on the general power of Government entrusted to the Company by the Parliament, and as others assert on their rights as successors of the old Native Governments ; some Regulations require registry in the Supreme Court, others do not ; some have effects generally throughout India, others are peculiar to one presidency or one town. There are commissions of the Governments, and circular orders from the Nizamat Adalat, and from the Diwani Adalat ; treaties of the Crown ; treaties of the Indian Government....'

Such a confused state of affairs could not be conducive to good government or an effective administration of justice. It was thus very desirable that 'so confused an issue should be

disentangled, and that as much as possible of it should be arranged and permanently fixed'. It was extremely necessary that something be done towards simplifying, rationalizing and systematizing the law throughout India. The chaos with which the legal system in India was afflicted could be effectively dealt with by Local Legislature—a legislative organ working in India. The Charter Act of 1833 *made some provisions* in this direction.

B

THE PROCEES OF CODIFICATION

INTRODUCTORY

The nineteenth century in England was the period of Bentham. A strong advocate of codification, he was hitting hard at the defects existing in the Laws of England at the time. The test to which Bentham subjected every institution or rule was its *utility* as a means of conducing to '*the greatest happiness of the greatest number*', and if it failed in the test it stood condemned, however venerable. His doctrine of *utilitarianism* had a profound influence on the course of legislation in England after 1830. Many important reforms in the field of Law and Procedure were undertaken.

It was at this time that the Charter Act happened to be passed by the Parliament. There were many responsible persons who had been profoundly influenced by the Benthamite doctrines. The confusion of the Indian Law was very well known. It could hardly stand the test of utility as propounded by Bentham. The protagonists of his views thus took opportunity to incorporate a few clauses in the Charter Act of 1833 which were designed to promote a process of codification of the law in India. Mr. Charles Grant in moving certain resolutions respecting the Charter of the Company referred to the sorry state of affairs prevailing in the Indian Legal System and attributed these defects mainly to three sources, namely, *in the laws themselves*, in the *authority for making them*, and in the *manner of executing them*.

On 10th July, 1833, in the course of debate on the

same subject, Lord Macaulay demonstrated the necessity and practicability of codification, that is, the conversion of all law into a written and systematically arranged code, in British India. 'I believe' said Macaulay, 'that no country ever stood so much in need of a code of laws as India, and I believe also that there never was a country in which the want might so easily be supplied'. Continuing he said, 'The work of digesting a vast and artificial system of unwritten jurisprudence is far more easily performed and far better performed by few minds than by many, by a Government like that of Prussia or Denmark than by a Government like that of England. A quiet knot of two or three veteran jurists is an infinitely better machinery for such a purpose than a large popular assembly divided, as such assemblies almost always are, into adverse factions. This seems to me, therefore, to be precisely that point of time at which the advantage of a complete written code of laws may most easily be conferred on India. It is a work, which cannot be well performed in an age of barbarism, which cannot without great difficulty be performed in an age of freedom. It is the work which especially belongs to a Government like that of India—to an enlightened and paternal despotism.'

To achieve the object of codification of Indian Laws, the Charter Act of 1833, passed by the Parliament, made provisions for the establishment of an All India Legislature, the creation of a new office of the Law Member and for the appointment of a Law Commission in India. The principles on which the future work of codification was to proceed were expounded by Macaulay in a celebrated passage in his speech in the Commons. He said, 'We must know that respect must be paid to feelings generated by differences of religion, of nation and caste. Much, I am pursuaded, may be done to assimilate the different systems of law without wounding those feelings. But whether we assimilate those systems or not, let us ascertain them, let us digest them. We propose no rash innovation, we wish to give no shock to the prejudices of any part of our subjects.....our principle is simply this—*uniformity where you can have it—diversity where you must have it—but in all cases certainty*'.

PROVISIONS OF THE CHARTER ACT 1833

The Charter Act made many vital alterations in the legislative system of India. In the first place, it created in the real sense an All India Legislature having authority to make laws and regulations for all territories in the possession and under the government of the Company at the time. The new Legislative Council had wide powers of legislation. It could repeal amend or alter any laws or regulations in force in the said territories. It could make laws and regulations for all persons, whether British or Native,foreigners or others. It could make laws for all Courts of Justice, whether established by His Majesty's Charters or otherwise. It could legislate for all places or things whatsoever within and throughout the whole and every part of the said territories, and for all servants of the Company.

This wide legislative power was, however, subject to some exceptions. It could not in any way alter the provisions of the Charter Act of 1833 itself. Neither could it change the Mutiny Acts nor could it alter the provisions of any Act of Parliament to be passed after 1833. Likewise, Council was not eligible to legislate so as to affect the prerogative of the Crown, or the authority of the Parliament, or the constitution or rights of the Company, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland 'whereon may depend in any decree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the said Crown over any part of the said territories'.

The Court of Directors, however, could signify to the Governor General in Council their disallowance of any laws or regulations enacted by them. On receipt of such disallowance, the Governor General in Council 'shall forthwith repeal all laws and regulations so disallowed'.

The legislative enactments of the new Legislature were clothed with a new halo, sanctity and dignity. The Laws and Regulations of the Legislative Council were to be of the same

force and effect as any Act of the Parliament and was to be taken notice of by all the Courts of Justice whatsoever in the same manner as any Act of Parliament. Henceforth there was no necessity of registering or publishing any law made by the Governor General in Council in any Court of Justice. The old rules under which the Regulations of the Calcutta, Bombay and Madras Governments, to be binding upon the Supreme Courts had to be registered with them, were thus abolished.

The powers of legislation were vested in the Governor General in Council. The Council, besides the Governor General, was to have four ordinary members out of whom one was to be the Law Member.[1] The three ordinary members were to be appointed by the Court of Directors from amongst persons who had been the servants of the Company for at least ten years. The Law Member was to be appointed by the Court of Directors from amongst the persons who had not been the servants of the Company. The Law Member was not entitled to sit or vote in the Council except at meetings for making laws and regulations. A sort of differentiation had been made between the legislative and the administrative functions of the Governor General in Council. While sitting in its legislative capacity, its quorum had to be the Governor General and three of the ordinary Members. In its executive capacity the quorum was the Governor General and one other ordinary Member. The Law Member sat as a full-fledged member when the Governor General in Council sat for legislative purposes. He could not do so when the Council was transacting some executive or administrative business.

The Governments at Bombay and Madras were deprived of their law making powers. All legislative power in the country had been thus centralised and concentrated in one body, that is the Governor General in Council at Calcutta.

The Charter Act took certain steps towards securing a uniform and simple system of law in India. Section LIII

1. The Commander in Chief could be appointed as the extraordinary Member of the Council.

recited that it was expedient that, subject to such special arrangements as local circumstances might require, a general system of judicial establishments and police applicable to all persons and all classes of inhabitants, might be established due regard being had to the rights, feelings and peculiar usages of the people. All laws and customs having the force of law should be ascertained, consolidated and amended.

Accordingly, it was enacted that the Governor General of India in Council should, as soon as convenient after the passage of the Act, issue a commission to such persons 'as the said Court of Directors with the approbation of the said Board of Commissioners, shall recommend for that purpose, and to such other persons, if necessary, as the said Governor General in Council shall think fit'. These persons were to constitute the Indian Law Commission. They were not to exceed five at one time. The Commissioners were required to inquire fully into the jurisdiction, powers, and rules of the existing Courts of Justice and police establishments in the British territories, and all existing forms of judicial procedure, and into the nature and operation of all Laws, whether civil or criminal, written or customary, prevailing in those territories.

The Commissioners were to make reports from time to time. In these reports they were to set forth fully the result of their inquiries. They were to suggest such alterations as might in their opinion be beneficially made in the Courts of Justice and police establishments, forms of judicial procedure and laws, 'due regard being had to the distinction of castes, difference of religion, and the manners and opinions prevailing among different races and in different parts of the Company's territories'.

FIRST LAW COMMISSION

In pursuance of the provisions of the Charter Act of 1833, the First Law Commission came to be appointed in 1834. The Commission consisted of the following members :

1. Mr. and later Lord Macaulay.
2. Mr. J.M. Macleod.

3. Mr. G.W. Anderson.
4. Mr. F. Millet.

The last three members of the Commission were from amongst the civil servants of the Company representing the three Presidencies of Calcutta, Madras and Bombay. The Commission met for the first time in 1834.

The state of Criminal Law prevailing in the various parts of India was very chaotic. In the three presidency towns the Supreme Courts administered the English Criminal Law, which had been touched here and there by the Regulations of the Local Governments. It was an artificial and complicated system, framed in a foreign country without any reference to India. To bring such a system of Law in harmony with the Indian conditions, it was necessary to subject it to extensive reforms and modifications.

The state of Criminal Law in the three provinces of Bengal, Bombay and Madras was also very confused. In Bengal and Madras provinces, Mohammedan Law of Crimes was the law of land and was applied to all. The Mohammedan Criminal Law was *primitive* and *unsuitable* to a civilised country. The respective Governments thus carried out extensive reforms by their Regulations so as to make the system workable. Bombay enjoyed a more favourable position in this respect because the Criminal Law there had been codified in 1827 by Monstuart Elphinstone and was enacted in Regulation XIV of 1827. The Bombay system of Criminal Law had this superiority to the law of other Provinces that it was *digested* while the other systems were *undigested*. The Bombay Digest, however, was not perfect. In framing it the principles according to which crimes ought to be classified, and punishments apportioned had not received any adequate attention.

The Anglo-Indian Regulations dealing with the Criminal Law had been enacted by different bodies, independently of each other without any coordination among them. The result was that there was no coherence or uniformity in the various systems of Criminal Law prevaling in the various Provinces.

Even on similar points the Regulations of one Government contained provisions widely different from the Regulations of the other. The Criminal Law became a *patchwork of enactments so confused that it was the first subject which invited codification.*

Under instructions from the Governor General in Council, the First Law Commission under the guidance of Macaulay proceeded with the work of drafting an Indian Penal Code. The Draft of the Penal Code which was mainly the work of Macaulay was submitted to the Government in 1837. It could not be immediately enacted into a Code. It had to wait for nearly a quarter of a century before it became law.

Lex Loci REPORT

Great obscurity engulfed the question of the Civil Law which determined the rights of such communities as Christians, Anglo-Indians, Armenians etc. residing in the Mofussil. The attention of the First Law Commission was directed to this question in 1837. The remedy proposed by the Commission was that an act should be passed making the substantive law of England the law of the land (*Lex loci*) outside the presidency towns, subject to the following restrictions and safeguards :

1. Only so much of the Law of England was to be applicable *as suited* the situation of the people and was not inconsistent with any Regulation or Act of the Indian Legislature.

2. It was not to apply to any person professing any religion other than the Christian religion in matters of Marriage, Divorce or Adoption.

3. Law and usage *immemorially* observed by any race or people not known to have been ever seated in any other country than India were to be safeguarded.

4. No Act of Parliament passed since 1726 was to be applied unless the Act was specially extended to India.

5. Rules of the English Equity were to prevail over the rules of the English Law.

6. Nothing in the above propositions was to apply to any Hindu or Mohammedan.

The question was one of peculiar difficulty and delicacy. The Government did not want to undertake any legislation on the subject in haste. The Report of the Commissioners was circulated to all the Local Governments, the Sadar Courts and other Officers of judgment and experience in the several Presidencies for their opinions and criticism.

The Report of the Commissioners was criticised very *vehemently* by some quarters. The scheme proposed by the Commissioners was a complicated one. A serious objection against it was that the Mofussil Courts, from unavoidable defects of technical knowledge of the English Law, would find it practically impossible to give effect to the proposals. The system of English Law was so vast, and the application of it was attended with so many difficulties, that to the Judges, not previously trained in its study, the difficulties in India would be insurmountable, since they were to administer a Law, with which they were unacquainted, without the aid of an enlightened Bar. Some suggested that the substantive law should be defined by preparing a digest of the English Law which was sought to be made applicable. Ultimately, the proposal of the Law Commission died out by the *efflux of time.* Nothing concrete was achieved. The value of the Report lay in the fact that it directed the attention of the intelligentsia in the country to the magnitude and the complicacy of the problems inherent in the process of codification of laws in India. The Report provoked a good amount of thinking on the part of the Authorities.

THE CASTE DISABILITIES REMOVAL ACT 1850

One portion of the *lex loci* Report of the First Law Commissioners was, however, immediately implemented. According to both the Hindu and the Mohammedan Laws,

conversion meant forfeiture of rights of property. The Christian converts and Missionaries did not like the Law. They made representations to the Government on this score. So far as Bengal was concerned a law had already been enacted in Section 9, Regulation VII of 1832 that renunciation of the Hindu or the Mohammedan religion should not entail the loss of rights to property. The First Law Commission suggested extension of the principle to the whole of India. The Commission suggested that so much of the Hindu and the Mohammedan Law, as inflicted forfeiture of rights or property upon any party renouncing or who had been excluded from the communion of either of those religions, must cease to operate in the Courts of the Company.

Legislative sanction was given to this principle in 1850 by Act XXI of that year. The Act of 1850 has come to be known as the 'Freedom of Religion Act' or 'Caste Disabilities Removal Act'.

Lord Macaulay, as its Chairman, had furnished the motive force to the First Law Commission. It was mainly due to his untiring efforts that the Draft of the Penal Code had been prepared. With his retirement from the Law Membership of the Government of India, activity of the Law Commission ceased and it languished into inactivity.

THE CHARTER ACT OF 1853

The Charter Act of 1853 made certain modifications in the legislative arrangements installed by its predecessor—the Charter Act of 1833.

Under the provisions of the Act of 1833, the Law Member was not entitled to sit or vote in the Governor General's Council except at meetings held for making laws and regulations. The Charter Act of 1853 repealed this provision, thus making the Law Member a *full-fledged* member of the Council.

For the better exercise of the powers of making laws and regulations vested in the Governor General in India in Council,

the Act of 1853 augmented that body by the addition of a few more persons so as to constitute a new Legislative Council. Besides the Governor General and Council, the new Legislative Council was to consist of :

1. One Member for each Presidency and Lieutenant Governorship to be appointed from time to time by the Governor of that Presidency and the Lieutenant Governor respectively, out of the persons having been or being at the time of their appointment in the service of the Company for at least ten years.

2. The Chief Justice of the Supreme Court, at Calcutta.

3. One Judge of the Supreme Court to be named by the Governor General.

4. The Court of Directors could direct the Governor General to add two more persons being or having been servants of the Company for at least ten years.

The difference between the Legislative Council and the Executive Council thus became more pronounced and marked. No law made by the Legislative Council was to be valid and was to have any force until it had been assented to by the Governor General.

Further, the new Act of 1853 contained certain provisions for the *re-appointment* of a Law Commission in England. The First Law Commission had, in a series of Reports, recommended extensive alterations in the judicial establishments, judicial procedure, and Laws established and in force in India, and had set forth in detail the provisions, which they proposed to be established by law, for giving effect to some of their recommendations. No final decision had been taken on these Reports. It was, therefore, necessary to make provision for the appointment of a new Law Commission for India.

Accordingly, the new Act laid down that it should be lawful for Her Majesty, by commission, to appoint several

persons in England *to examine and consider* the recommendations of the First Law Commission, and the enactments proposed by them for the reform of the judicial establishments, judicial procedure, and Laws, as might be referred to them for their consideration. The Law Commission was to report its opinions to Her Majesty on the matters aforesaid, and especially to report from time to time what laws and regulations should be made or enacted in relation to the matters aforesaid, but every such report had to be made within three years after the passing of the Act of 1853.

SECOND LAW COMMISSION

Under the provisions of the Charter Act of 1853, a Law Commission, known as the Second Law Commission came to be appointed in England on 9th November, 1853. The Commission consisted of the following gentlemen :

1. Sir John Romilly, Master of the Rolls.
2. Sir John Jervis
3. Sir Edward Ryan
4. R. Lowe afterwards Lord Sherbrook
5. C.H. Cameron
6. John M. Macleod
7. T.F. Ellis.

The purpose of the Commission was to examine and consider the recommendations of the First Law Commission and to make recommendations for the reform of Courts, procedure and law in India. The Commission worked till the middle of 1856. During this period the Commission produced four Reports, out of which second is the most important Report as it contains the recommendations of the Commission regarding the grounds on which the future work of codification of the substantive law in India was to proceed.

THE SECOND REPORT OF THE LAW COMMISSION

The Second Law Commission in its second Report suggested the policy and the principles on which the work of codification in India was to proceed.

In the first place, the Law Commission pointed out the needs of India in respect of substantive Civil Law. Beyond the capital towns of the three Presidencies, there was no substantive law for the various classes of persons other than the Hindus and the Muslims, who had no special law of their own which the Courts were required to enforce. This was a great want which had to be met.

The system of laws in India, in the opinion of the Commission suffered from another great defect. The Supreme Courts administered within the limits of the capital towns, to Europeans and others not Hindus and Mohammedans, the substantive law of England. There was thus a great difference between the state of the presidency towns and that of the Provinces in respect of law, for in the Provinces, the English Law was not administered as a *matter of course*.

There was another difference which affected transactions of the Hindus or the Mohammedans among themselves, arising from the different terms in which the kinds of cases to be decided by the special laws of the Hindus or the Mohammedans were described by the Legislative Authority, for the guidance of the Supreme Courts and for that of the Courts in the Provinces.

It is thus clear that there was a very great difference between the state of law in the Provinces and the state of law in the presidency towns. This was an *evil* of no mean magnitude. It produced much inconvenience. It was necessary, in the opinion of the Commission, to allow certain big classes of persons to have special laws, recognised and enforced by Courts of Justice, with respect to certain kinds of transactions among themselves. But it was neither necessary nor expedient that, for any persons, the law should vary according as they resided within or beyond the boundary of the presidency town.

After giving attention and consideration to the means of remedying the great defects in the state of laws in India, the Commission came to the conclusion that *'what India wants* is a *body of substantive civil law*, in preparing which the Law *of*

England should be used as a basis ; but which, once enacted, should itself be the *Law of India on the subjects it embraced.*'

The Commission further recommended that such a body of law should be prepared with a *constant regard* to the *conditions and institutions of India,* and the character, religions, and usages of the population. Such a Code was bound to be of great benefit to India. The law thus enacted was to be uniformly applicable to all persons and all places. The Commission's recommendation on this point was : 'Being designed to be the law of India on the subjects it embraces, this body of law should govern all classes of persons in India, except in cases excluded from the operation of its rules by express provisions of law.' There was no reason, in the opinion of the Commission as to 'why, on very many important subjects of civil law, we shall name one, Contracts, as an example, such law cannot be prepared and enacted as will be no less applicable to the transactions of Hindus and Mohammadans, by far the most numerous portions of the population than to the rest of the inhabitants of India.' The Commission thus advocated the idea of a uniform system of law throughout the length and breadth of the country though it also envisaged the possibility of certain exceptions. For the Commission observed, 'If on any subject embraced in the new body of law it should be deemed necessary that for a particular class of persons or for a particular district or place there should be law different from the general law, and if there shall be no particular and cogent objection to the insertion of such special law into the proposed body of law, such special law, we think, ought to be provided in that way.'

The Commission further made a very significant recommendation. It gave its verdict against the attempt to codify either of the personal laws of the Hindus or the Muslims. In the opinion of the Commission 'no portion either of the Mohammadan Law or of the Hindu Law ought to be enacted as such in any form by a British Legislature. Such Legislation, we think, might tend to obstruct rather than to promote the gradual progress of improvement in the state of the poplation.'

Giving the reasons which had led the Commission to give its opinion against the advisability of codifying the Hindu and Mohammedan Laws, it observed: 'The Hindu Law and the Mohammedan Law derive their authority respectively from Hindu and Mohammedan religion. It follows that, as a British Legislature cannot make Mohammedan or Hindu religion, so neither can it make Mohammedan or Hindu Law. A Code of Mohammedan Law, or a digest of any part of that law, if it were enacted as such by the Legislative Council of India, would not be entitled to be regarded by the Mohammedans as the very law itself, but merely as an exposition of law, which possibly might be incorrect. We think it clear that it is not advisable to make any enactment which would stand on such a footing.'

The Commission concluded by saying, 'We have the satisfaction of being able to state that our opinions as to the defects in the state of the substantive civil law in India, and the expediency of framing and enacting a body of laws for India based upon English Law, are very much in accordance with the views of the Law Commissioners in India', that is the First Law Commission.

OTHER REPORTS : NEW CODES ENACTED

In its other Reports, the Second Law Commission submitted a plan for the amalgamation of the Supreme Courts and the Sadar Courts, an uniform Code of Civil Procedure and also an uniform Code of Criminal Procedure applicable to all the Courts in British India.

The question of codification of laws had been hanging fire for long without any substantial success being achieved in this respect so far. The events in India in 1857, however, introduced a new urgency in the whole scheme of things. In 1858, the Government of India was assumed by the Crown. This was rapidly followed by several Codes in quick succession. In 1859, the Indian Legislature enacted the Code of Civil Procedure, being Act VIII of that year. In 1860 followed the Penal Code; in 1861, the Code of the Criminal Procedure. The

Act of Limitation, X of 1859, was passed immediately after the Code of Civil Procedure.

THIRD LAW COMMISSION

The life of the Second Commission was short, it being expressly restricted to three years under the Act of 1853. Within this period it was impossible for the Commission to attempt to complete such an edifice as they projected or even to lay its foundations, but they did great work when they laid out the scheme and the principles on which the future work of codification was to proceed in India.

On 14th December, 1861, a fresh Commission was issued to certain persons for the purpose of preparing a body of substantive Civil Law for India. The fresh Commission was expressly based on the second Report of the previous Commissioners and indicated that the Government had accepted the policy laid down in that Report. The new Commissioners were directed to frame 'a body of substantive law, in preparing which the Law of England should be used as a basis, but which once enacted should itself be the Law of India, on the subject it embraced; and also for the purpose of considering and reporting on such other matters relating to the reforms of the laws of India as might be referred to them by the Secretary of State'.

The Commission originally was issued to :

1. Sir John Romilly, Master of the Rolls.
2. Sir W. Erle, Chief Justice of the Common Pleas.
3. Sir Edward Ryan.
4. Mr. Robert Lowe (Lord Sherbrook)
5. Mr. Justice Willes, and
6. Mr. J. M. Macleod.

The membership of the Commission changed somewhat as time went on.

The Secretary of State for India, Sir Charles Wood, requested the Commissioners that unless there was any objection to such a course, the results of their labours on one branch

of Civil Law might be reported before they entered on the consideration of another branch, as the plan of successive reports on the various departments of Law would greatly facilitate the necessary measures which must be taken in India, for giving effect to the recommendations of the Commissioners.

The issuing of the third Commission was a very significant event in the process of codification of Indian Laws. The Third Law Commission 'set on foot the work of drafting and may be taken as the end of the discussion on policy and as closing—if not a chapter—at least a paragraph of British Indian History which may be entitled 'The Codes are Coming.' [1]

The Third Law Commission submitted seven Reports containing the Drafts of proposed Rules of Law to the successive Secretaries of State, who transmitted these various Drafts to the Government of India with a view to their legislation. In the first instance, the Commissioners directed their attention to the preparation of the Law of Succession and Inheritance generally applicable to all classes other than the Hindus and the Mohammedans. The first Report submitted on June 23, 1863 contained a Draft which with little variations became the Indian Succession Act of 1865. On July 28, 1866, a draft Law of Contract was submitted. In their third Report, dated July 24, 1867, they submitted a Draft of the Law of Negotiable Instruments. In their fourth Report in 1867, they replied to certain remarks of the Government of India relating to Specific Performance. Their fifth Report August 3, 1868, contained a Draft of the Evidence Act. On May 28, 1870, they submitted a draft of the Law of Transfer of Property in their sixth Report. Their seventh and the last Report was dated June 11, 1870, and dealt with the revision of the Criminal Procedure Code.

In India, the progress in legislating the Drafts of the Commissioners into law was not so quick as they had expected. The Law Commission in England was becoming restive and

1. Rankin, Background to Indian Law, 45.

dissatisfied at the delay in enacting their draft Bills. Early in 1869 the Commissioners complained to the Secretary of State for India that no progress was being made in India with the enactment of their Drafts.

In the meantime, certain differences of opinion arose between the Commissioners and the Government of India over certain features of the Contract Bill as drafted by the Commissioners. The Select Committee of the Legislative Council made numerous alterations of great importance in the Contract Bill. This the Commissioners did not like. They, therefore, resigned in 1870 on the ground that their Drafts were not being enacted by the Indian Legislature. They complained of the continued, systematic and persistent *inaction* of the Indian Legislature which, as they put it, 'defeats the hope which we entertained that we were laying the foundation of a system which when completed would be alike honourable to the English Government and beneficial to the people of India'.

And thus expired 'in a huff', as Ilbert says, 'the third of the Indian Law Commissions'.

THE INDIAN SUCCESSION ACT 1865

The big classes of population, the Hindus and the Mohammedans, were governed by their own respective personal laws in matters of inheritance and succession. The position regarding other classes of population like Jews, Christians, Armenians, Anglo-Indians, Parsees and Europeans was not clear. In the presidency towns these persons were governed by the English Law. In the Mofussil, there was extraordinary uncertainty and fluctuation of professional opinion. The view commonly held was that each European was entitled to the law of his original country and that he transmitted this law to his legitimate descendants. The inevitable result of this condition was confusion. So far as the Europeans were concerned the confusion had not made itself acutely felt as their number was very small. There was danger of this confusion becoming worse confounded with the number of Europeans multiplying. There does

not appear to have been any fixed practice regarding the law applicable to Christians, Jews, Anglo-Indians etc.

On a consideration of all these circumstances the Third Law Commission came to the conclusion that there was a 'great want of substantive civil law' for various classes of persons not professing the Hindu or the Mohammedan religion. A law to regulate devolution of property on death was most urgently required by those classes. It was in consequence of this necessity that the Commissioners in their very first Report produced a Draft of the Indian Succession Act.

The Report of the Commissioners on the proposed Inheritance Act was not an isolated affair. It was conceived of as a part—as Chapter I—of a comprehensive scheme to form an Indian Civil Code—a Code of all the Civil Laws of India.

The Act contained the Law of Intestate and Testamentary Succession. The Law of England was used as the basis for the preparation of this Act. But in doing so the Commissioners did not slavishly follow the English Law. They deviated from that body of law in some important points. The aim throughout had been to discard those features of the English Law which were merely technical and archaic, and to achieve a sort of simplicity and coherence. To achieve this aim, the Commissioners made two chief deviations from the English Law in drafting the Act :

1. The English Law maintained two systems for the devolution of property, one for moveable and the other for immoveable property. This system of double Law of Succession for *realty* and *personalty* was the great cause of intricacy and difficulty of much of the English Law. The Commissioners attempted to do away with the technical feature which was reminiscent of the feudal age. In the Inheritance Act, all rights and property, whether *realty* or *personalty*, devolve in accordance with one coherent scheme. About this distinction between *realty* and *personalty*, Maine stated, 'It has been calculated that but for its existence, the largest part of the law contained in the English Equity Reports might at once be dispensed

with'. Austin called this distinction as the 'one prolific source of the intricacy of the system of the law of England'. Evidently, it was a *welcome* step that unnecessary technical distinction of the English Law was not imported into the Indian Law.

2. After January 1, 1866, no person was to acquire by marriage any interest in the property of the person whom he or she marries. This made many important changes in the common law rights, liabilities and disabilities arising out of the relation of the husband and wife.

These two changes at once, at one stroke, introduced an amount of simplicity into the Law which, in the words of Maine, 'was almost incredible'. The Commissioners, however, did not stop with this. They carefully stripped the English Law of a number of other complications. The rules contained in the Act of India are, therefore, much simpler as compared with the analogous English Law. Sir Henry Sumner Maine, the Law Member at the time of the enactment of the Act, and responsible for sponsoring it in the Legislative Council, commented on the simplicity of the Act in these words: 'So far as the present chapter is concerned, the rules which it includes are, for the most part, so extremely simple as to be readily intelligible to a layman; and my belief is, that any man of intelligence can form a competent judgment on their character and probable effects...It does not appear to me that, for the sake of attaining simplicity, the Commissioners, so far as they have gone, have sacrificed any really valuable principle of English Jurisprudence. On the contrary, I regard the system which they propose not only as much more intelligible to the generality than that which at present obtains in the Presidency Towns, but as much more conducive to the certainty and security of all legal transactions.'

Following the example set by the framers of the Penal Code, the framers of this Act have also made copious use of illustrations. Most of them were taken from the English Equity Reports. These examples serve as 'not merely examples of the law in operation, but the law itself, showing by

examples what it is'. The result of this practice has been very beneficial for the development of the Indian Law. The use of examples has obviated many questions of construction. It has done much to fix and ascertain the law. There may be some objections to a Code which contains merely abstract propositions. Its defects are got rid of by making use of the examples.

The confusion and chaos in which the Law was embroiled before the passage of the Act has already been pointed out. The Act thus served as a *'boon'* to those persons for whom it was meant. It did away with the uncertainty and confusion in the Law. It enunciated the Law in a coherent and logical manner. It introduced a very simplified system. It was a very well drawn Act. Its chief merit lay in the clearness of its expression in matters of detail. 'The draft Succession Act', observes Rankin, 'must be adjudged a most valuable and distinguished piece of work, carried out by a body of real experts who devoted their knowledge and abilities to the cause of clearness and simplicity, and took right and bold decisions on major questions of principle. Archaisms were rigidly eschewed[1].'

The Draft of the Succession Act, when it arrived in India received a very cordial reception. Sir Henry Maine, the then Law Member spoke in glowing terms about its merits. He told the Council 'even in England this body of rules has never been put into so intelligible and accessible a shape as it is placed by this Law', that when they had examined it 'the strongest impression left on their mind will be respect for the Commissioners who prepared it'; and that the labours of the Commission 'are probably destined to exercise hardly less influence on the countless communities obeying the English Law than the French Codes have exercised, and still exercise, over the greater part of the continent of Europe'.

The Act was to serve as the general law governing all

1. Rankin, Back-ground.....47.

who were not expressly exempted from it. Europeans, Eurasians, Jews, Armenians and Indian Christians were subject to this general law. Hindus, Mohammedans and Budhists were excluded from the Act, and the Governor General in Council was given power to exclude any Indian races or tribes not falling within these classes. Parsees came to have a separate Law as to Intestate Succession in the very same year i.e. 1865. The Inheritance Act, however, applies to them in cases of testamentary succession.

In 1925 the Act of 1865 was revised and a consolidating measure called the Indian Succession Act, 1925 was passed. The scheme of the new measure in main remains the same as that of the old Act. Certain modifications and amendments, however, have been introduced. Since 1929, many of the provisions of the Act of 1925 have been made applicable to the wills of Hindus, Jains, Sikhs and Budhists.

INDIAN PENAL CODE

The Penal Code was enacted in 1860 and came into operation on January 1, 1862. The Code is based primarily on the Draft prepared by the First Law Commission in 1837. The credit of revising Macaulay's draft and passing the Penal Code into Law is due to Sir Barnes Peacock who was the Law Member of the Government of India at the time.

The system of Penal Law prevailing in India at the time of Macaulay's draft was incoherent, incomplete and haphazard. The First Commission did not think it desirable to take as the groundwork of the Code any of the systems of law then in force. The Commission compared the draft Code with all those systems and took suggestions from all of them. They also compared their work with the most celebrated systems of the Western Jurisprudence. They derived much valuable assistance from the French Code and from the decisions of the French Courts of Justice on questions touching the construction of that Code. The French Code was of great help as a model and upon many questions of form afforded some valuable suggestions on specific points. The Commission

derived assistance from the Code of Louisiana prepared by Mr. Livingston. But much of the substance of the Code has been taken from the English Law. In the opinion of Whitley Stokes the basis of the Code is the Law of England, 'stript of technicality and local peculiarities, shortened, simplified, made intelligible and precise'. 'The draft and the revision', in Stephen's view, 'are both eminently creditable to their authors ; and the result of their successive efforts has been to reproduce in a concise and even beautiful form the spirit of the Law of England ; the most technical, the most clumsy, and the most bewildering of all systems of criminal law.... his draft gives the substance of the criminal law of England, down to its minute working details, in a compass which by comparison with the original may be regarded as almost absurdly small'.

The Code has a great superiority over the English Law. Its propositions are couched in simple language. The various offences have been very precisely defined. Many of the rules of English Law have been incorporated in the Code only in a modified form. In many places the Code deviates from the English Law. The Code also takes notice of, and tries to deal with, some of the special problems of India. The Commission very carefully considered the special conditions of India with a view to avoid making conduct punishable where no sufficient advantage was likely to accrue from applying the Criminal Law; as also from the standpoint of making special provisions against crimes peculiar to India.

The Indian Penal Code had been highly successful. Its propositions are concise and comprehensible and its merit would become clear even to acasual observer if only he compares it with the Penal Law prevailing in the country before its enactment. It has suppressed crimes in the country. It is due to its intrinsic worth and merit that though the Indian Penal Code was passed in 1860, yet it is the same even now as it was in 1860. During all this period only a very few modifications have been made in the Law.

Inspite of its great success, perhaps, time has now come to revise and re-enact the Penal Code. Its arrangement is not

very scientific. During a long time of its working many important and conflicting decisions have been rendered by the High Courts and so doubt exists on a number of points. Moreover, since the days of Macaulay many changes in conceptions and thoughts have taken place among the civilized people and the provisions of the Penal Code need modifications in the light of modern trend of thoughts.

It is a standing complaint against the Code that 'it is Draconian in its severity as regards punishments'. The same point of view was put forward in the Madras Law Journal, where it was said: 'The Penal Code is one of the much praised Acts of the Indian Legislature and in spite of its many defects has served its purpose fairly well. Its sentences can hardly be said to be other than monstrous. No civilized country today imposes such heavy sentences as does the Penal Code. Heavy sentences have long gone out of fashion in England and the odour of sanctity and perfection attaching to the Penal Code should not deter indigenous legislatures to thoroughly revise the sentences and bring them into conformity with modern civilised standards.'[1]

THE CRIMINAL PROCEDURE CODE

The Government of India had laboured for long and zealously to produce a Code of Criminal Procedure which should be easily understood, cheap, expeditious and just. It was necessary to supplement the Indian Penal Code by wise rules for preventing offences and bringing the offenders to justice. Without an adequate Law of Criminal Procedure the provisions of the Penal Code could not be administered effectively by the Courts.

As early as 1847 the President in Council instructed the First Law Commission to prepare a scheme of pleading and procedure with forms of indictment adapted to the provisions of the Penal Code, a Draft of which had already been prepared. The Commissioners submitted their Report in 1848. This Draft was examined and considered by the new set of Commissioners

1. 57 Madras Law Journal, 60.

which were appointed in 1854 under the provisions of the Charter Act of 1853. The Second Law Commission produced a draft Code, which was introduced into the Legislative Council by Mr. Peacock. It was ultimately passed by the Legislative Council as Act XXV of 1861. The new Code came into force on January 1, 1862. Originally, it applied to the Regulation territories, but was gradually extended to the rest of British India exeept the three presidency towns.

Act X of 1872 repealed and replaced the Criminal Procedure Code of 1861. The Code of 1872, like that of 1861, was neither applicable to the High Courts nor to the Magistrates' Courts at the presidency towns. Act X of 1875 regulated the procedure of the High Courts in the exercise of their original criminal jurisdiction. Act IV of 1877 was passed to regulate the procedure of the Magistrates' Courts at the presidency towns. The system of Criminal Procedure in India at the time was thus very *cumbersome* and was contained not in one but *three Codes*. Many of the provisions of the three Acts merely repeated one another; many of their rules, though dealing with the same subjects, unnecessarily varied in language. The bulk of the Indian Statute Book was unnecessarily far greater than it needed to be. The whole of the Code of 1872 was revised, and a new Code was passed in 1882, a single and complete Code which was applicable to all the Courts in the country and which provided a simple and uniform system of law on the subject. Later certain further amendments were incorporated in the Code of 1882. The whole Code was *re-enacted* in 1898 as Act V of that year which continues to be in force even to-day, though certain amendments have been effected after its enactment in 1898.

The present Code of Criminal Procedure is a long piece of legislation divided as it is into 565 sections and 46 chapters. The whole is divided into 9 parts. It deals with the constitution and powers of various categories of Criminal Courts, prevention of offences, trial of offences and with appeal, references and revision. The Code is a complete body of criminal procedure. It combines the merits of the English, or accusatory,

system, with the facilities for arriving at the truth afforded by the Continental, or inquisitorial systems. Its provisions are very plain and practical.[1]

THE CIVIL PROCEDURE CODE

Before the passage of the Code of Civil Procedure, law on this important branch was almost chaotice. In the words of Stokes, 'There were no less than nine different systems of civil procedure simultaneously in force in Bengal : four in the Supreme Court, corresponding to its common law, equity, ecclesiastical and admiralty jurisdictions ; one for the Court of Small Causes at Calcutta ; one in the military Courts of Requests ; and three in the Courts of the East India Company, one for regular suits, a second for summary suits, and a third applicable to the jurisdiction of the Deputy Collector in what were called resumption-suits'.[2]

The procedures, as well as the jurisdictions, of the Supreme Court were all founded on the Charter of George III, dated 26th March, 1774. These jurisdictions were technically termed 'sides' of the Court, and the procedure on each 'side' was similar to the procedure of the corresponding Court in England, with some minor differences.

Mutatis Mutandis, in other parts of the British India the systems of civil procedure were equally numerous, and equally imperfect. The whole system of civil procedure was in a deplorable state. There was uncertainty and confusion. There was no certainty, order or accuracy in the procedure of the Courts. Its want of uniformity was equally incontestable. The evils arising from such a state of affairs had long been felt. The First Law Commission went through the question of *civil procedure*, recommended extensive alterations therein and drafted a Code of Civil Procedure. But the question was taken in right earnest only by the Second Law Commission which was instructed thus by the Secretary of State for India :

1. Whitley Stokes, Anglo-Indian Codes, 35.
2. Stokes, ibid. 381

'It is obviously most desirable that a simple system of pleading and practice, uniform, as far as possible, throughout the whole jurisdiction, should be adopted, and one which is also capable of being applied to the administration of justice in the inferior Courts of India. The embarrassment will thus be avoided which a diversity of procedure throws in the way of an appellate jurisdiction; and the proceedings in the new Court[1] will be a pattern and guide to the inferior tribunals in the Mufassil.

'Your first duty, therefore, should be to address yourselves to the preparation of such a code of simple and uniform procedure'.

The Commissioners accordingly produced Drafts of the Civil Procedure for various Courts. A cumulative Civil Procedure Code based on these Drafts was passed as Act VIII of 1859. Initially the Code did not apply to the Supreme Courts, the Presidency Small Cause Courts and the Non-Regulation Provinces. In course of time, however, it came to be applied to almost the whole of the British India. It was also made applicable to the High Courts, by their Letters Patent, in the exercise of their jurisdictions.

The Code of 1859 was amended by various subsequent Acts. Its arrangement was bad and it suffered from many defects. In the words of Stokes, 'Again, the Code of 1859 was unquestionably ill-drawn, ill-arranged and incomplete, and there had been a large number of decisions, which showed either some inconvenience in the rules of the Code or some ambiguity of expression, or absence of direction, which had given rise to disputes. To a certain extent these matters were settled by judicial decisions; but the decisions, however well they might interpret the language of the Code, did not always lay down the rules most beneficial to suitors, and even in the more frequent instances, when the decision laid down the best rule, it was often convenient to embody it in the written law.[2]'

1. The Court proposed to be formed by the union of the Supreme and Sadar Courts in each Presidency, which were called as High Courts.
2. Stokes, II, 386.

Accordingly, the work of revising the Code of 1859 was undertaken. The revised Code became law in 1877. Within a very short time it became clear that several amendments, both formal and substantial, were desirable. It was again revised—the present Code being Act XIV of 1882. The Code on the whole has worked satisfactorily though certain amendments have been effected in it since the day of its passage. The Code of Civil Procedure, as the name indicates, deals with the various aspects of the procedure of the Civil Courts in the country.

MORE CODES PASSED

During the *interrugnum* between the resignation of the Third Law Commission and the appointment of the Fourth Law Commission, the Legislative Department of the Government of India got busied in preparing certain Drafts. As a result of its labours the Indian Legislature was enabled to enact into law some majore Codes.

The Indian Contract Act was passed in 1872 as Act IX of that year. As early as 1855 the Second Law Commission in its second Report had suggested the enactment of a uniform body of the Law of Contracts which might be applicable to all Hindus, Muslims and others. In pursuance of this recommedation the Third Law Commission prepared a Draft of the Law of Contracts in 1866, saying that it was the subject which afforded the most frequent occasion for litigation in all parts of India, and that on it they were satisfied that a law could be framed applicable to the whole population.

The Draft of the Law Commissioners was 'an original and expert attempt to present a simplified statement of the English Law of Contract with some modifications—not a great number, though some were important and indeed remarkable—intended to make it suitable for India[1].'

This Draft was not fated to be enacted into law immediately. The Government proposed to amend it in certain

1. Rankin, Background 94

particulars and the Law Commissioners protested and resigned. Sir James Stephen the Law Member revised the original Draft which became law in 1872. The Contract Act contained clauses on contracts in general giving the fundamentals of the subject. It also dealt with the Sale of Goods, Indemnity and Guarantee, Law of Bailment, Agency and Partnership.

The Contract Act of 1872 has been criticised by many leading jurists and lawyers. In the opinion of Stokes its provisions are incomplete and sometimes inaccurately worded. He advocated its repeal and re-enactment with modifications in arrangement, wording and substance. In the opinion of Lord Bryce the workmanship of the Contract Act is very defective. It is neither exact nor subtle and its language is often far from lucid. In the opinion of Pollock this is the 'worst piece of codification ever produced'. The framers of the Contract Act were tempted to borrow a section here and a section there from the draft Civil Code of New York and this has resulted, in the opinion of Pollock, in 'unequal workmanship' and sometimes in 'positive error'. In 1925, the Civil Justice Committee said, 'The Indian Contract Act was in some respects a far-sighted statute but it was never among the best of our Codes and to-day it needs amendment'.[1]

Attempts has been made to improve the Law of Contracts in several respects. In 1930 a separate Act on the Sale of Goods was passed. In 1932 the Indian Partnership Act was passed. These two Acts followed closely the analogous English Acts. They have stated the respective law more fully and minutely. The analogous chapters in the Contract Act of 1872 were repealed as a consequence of the passage of the two Acts. Apart from this the Contract Act has not been much modified during the past eighty years that it has been in operation. Time has now came when it should be revised in the light of its criticism in the pronouncements of the Courts and re-enacted.

1. Report, 536

THE INDIAN EVIDENCE ACT

The year 1872 witnessed the enactment of another piece of legislation in the Indian Evidence Act.

Before the passage of the Act the law on the subject was very doubtful and uncertain. Since the establishment of the Supreme Courts in Calcutta, Madras and Bombay, and probably since the establishment of their predecessors the Recorders' Courts, the English rules of evidence had always been followed in the presidency towns as part of the English Law generally administered by the Courts. In the middle of the nineteenth century several of the reforms made in England by Parliament were extended to the Supreme Courts by the Indian Legislature.

The Courts in the Mofussil were not obliged to follow the English Law of Evidence as such, though they were not debarred from following it where they regarded it as the most equitable. The Regulations of the various Governments had prescribed some rules of evidence. Besides, there existed a sort of vague customary Law of Evidence, partly drawn from the *Hedaya* and the arguments of the Mohammedan Law Officers; partly from the English text books and the arguments of the English barristers who occasionally appeared in the Mofussil Courts. The position was difficult for the Mofussil Judges. The English barristers always insisted on them to follow some Law of Evidence and for this purpose they based their arguments on the English Law. The Judges in the Courts were not very much acquainted with the English Law of Evidence. They had no books, no reports and no other source from which they could ascertain the English Law.

Before the passing of the Act in 1872, the whole of the Indian Law of Evidence could be divided into three portions.

1. The portion settled by the express enactments of the Legislature.

2. The portion settled by judicial decisions.

3. The unsettled portion, and this was by far the largest of the three. This circumstance produced much uncertainty of law.

Taking all these circumstances into consideration, the Third Law Commission prepared a draft Bill on the Evidence and submitted their Report in 1868. The draft Bill was very short containing only about 39 clauses. The Draft was introduced into the Indian Legislative Council and referred to a Select Committee in 1868. The Draft failed to be enacted. The reasons are given by Stokes for the Draft to fall through. He says, 'But it was pronounced by some competent persons to be unsuited to India. It was far from complete; it was ill arranged; it was not elementary enough for the officers for whose use it was designed; and it assumed an acquaintance with the law of England which would scarcely be expected from them'.

A new Bill was then prepared by the then Law Member Sir James Stephen which was enacted into law in 1872. The Act is based primarily on the English Law, modified in certain respects. The Evidence Act has been the subject matter of a large number of judicial decisions which have pointed out many defects both in form and substance. At places it has been found to be inadequate. During the last seventy five years that the Act has been in existence the Legislature has not introduced many amendments in the Act as passed in 1872. It is, therefore, suggested by many that the time has come when this Code should be revised.

FOURTH LAW COMMISSION

The process of codification of law had been going on for long. Many important branches of law had already been codified which was responsible for removing a serious amount of complexity and confusion from the Indian Legal System. But there were some of the chief branches of law still uncodified and litigation and questions arising under them were subject to needless cost and uncertainty.

In the early months of 1875, Lord Salisbury the Secretary of State for India drew the attention of the Government of India to this aspect of the problem. He pointed out that the statutory provision for the appointment of an Indian Law Commission was still in force. He therefore suggested that the task for preparing Codes of the remaining branches of law might be taken in hand.

The Government of India hesitated to accept this suggestion. In another Dispatch the Secretary of State had to remind the Government that 'the long and continuous course of action which has been pursued by the Indian Government in all its branches forbids me to regard the question of giving a Civil Code to India in any sense an open one.' He further declared, 'The completion of a Code of law is an accepted policy, which cannot now be abandoned without great detriment to the people and serious discredit to the Indian Government.'

The need for such a Code was even greater at this time than when its preparation was first decided upon. The amalgamation of the Supreme Courts and the Sadar Courts had been effected so as to create several High Courts. These High Courts were directed to administer justice according to 'justice, equity and good conscience' where there was no specific rule of law available to them for deciding causes. In the absence of enacted law on many branches there was a danger that the Judges would secure guidance from the English Law, which system was known to the Judges but unknown to litigant parties and even to the Judges in the Lower Courts. There was a danger of the Judges importing into India *technical rules* from the English Law indiscriminately. Such rules which might be suitable in the context of England were bound to be utterly out of place in India. 'Thus, it is said,' observed the Secretary of State, 'many rules ill-suited to oriental habits and institutions, and which would never recommend themselves for adoption in the course of systematic law making, are indirectly finding their way into India by means of that informal legislation which is gradually effected by judicial decisions'.

The only way of checking this process of borrowing English rules from the recognised English authorities was by substituting for those rules a system of codified law, adjusted to the best native customs and to the ascertained interests of the country.

The Government of India suggested that the following branches of substantive law might be codified—Trusts, Easements, Alluvion and Diluvian, Master and Servant, Negotiable Instruments, and Transfer of Immoveable Property. The task of drafting these Bills was entrusted to Dr. Whitley Stokes. It took him two years to finish this work. On 11th February 1879, the Government of India appointed a Commission to consider the provisions of these Bills, to report thereon and to make suggestions as to codification of the substantive law of British India. The Commission was composed of Dr. Whitley Stokes, Sir Charles Turner, the then Chief Justice of Madras, and Mr. Raymond West, a Judge of the High Court, Bombay. The Commission submitted its Report on the 15th November, 1879.

The Commission made the following specific recommendations in their Report.

1. The process of codification of well-marked divisions of the substantive law should *continue*.

2. While dealing with the several branches of law by distinct Acts, the ultimate and eventual design of forming and combining these Acts into a single and general Code ought never to be lost sight of.

3. There was no proper and adequate material in India out of which the Indian Legislature could draw its principles and rules for legislation in future on special topics. It was, therefore, necessary that the *English Law* be made the basis, in a great measure, of the Law in India.

4. It was necessary to *recast* the materials of English Law rather than adopt them 'undigested, unassayed and unmodified' The main defect of the English Law was 'its

insularity, its shrinking from general principles, its bit by bit growth on the results of particular cases'. A body of decisions had been collected in the English Law Reports. The task to make use of such a body of law, 'must be of cautious discrimination as well as of organisation'. There should not be a random adoption of the English principles. What was needed was a careful analysis of the English Law and a careful and conscious selection 'from the mass of those principles which promise to be strong, fruitful and beneficient'.

5. It was imperative for the Indian Legislators to be in *constant touch* with the native habits, customs, traditions and the current of their thought. In every case the most important inquiry was : How far, and in what form, were the particular rules accepted in England suited to the country and community ? To answer this question a mere knowledge of juristic science was not sufficient. There must be a competent knowledge of the existing written laws, intimacy with native habits and modes of thought, 'a set of associations through which the mind of the inquirer is spontaneously affected with an emotion, or the reflex of an emotion, akin to that which will be on any occasion felt by the ordinary Mussalman or Hindu'.

Elucidating the observation further the Commission suggested that the *Indian system* of laws should not be *ignored* or lost sight of while carrying on work of legislation. 'Hindu society has its own laws of unmeasured antiquity. It has its religion closely interwoven with these laws. It has the customs which that religion consecrates and springing fresh from the nature of the people'. To ignore these facts was to invite failure. 'It is a living body that we have to deal with, identical in some respects with others of the same species, but with its individuality and its need for individual treatment...'

6. The propositions of the Code should be broad, simple and readily intelligible.

7. There should be a *uniformity* of law. But the Commission recognised that in some cases exceptions must undoubtedly be made where what 'is special and local cannot be made

immediately to yield to what is general without a diminution of the people's happiness.' The aim to achieve was uniformity of law, but local and special customs might be treated *considerately*.

8. The Commission was not in favour of further codification in the field of *Family Law*. For the great mass of people such law was mingled with religion which, in the opinion of the Commission, it would be a political sacrilege to touch.

9. The laws relating respectively to Negotiable Instruments, to the subjects dealt with by the Transfer of Property Bill, to Trusts, to Alluvion, to Easements, and Master and Servant, should be *codified*, and the Bills already drawn by the Commission be passed into law.

10. After the passage of these Acts, the Law of actionable wrongs should be codified.

11. Concurrently with or after the framing of a Law of actionable wrongs, the Law relating to Insurance, Carriers, and Lien should be codified.

12. When the Acts suggested above have been passed, the Law of Property in its whole extent would be a fit subject for the attention of the Legislature, which was a wide and intricate subject, demanding for its mastery a mind well furnished with general principles, and with ability to grasp and measure details, and the whole subject needed a close and prolonged study and observation by specially capable men.

13 It was further proposed that by the side of constructive legislation 'a preparation might well be made for a systematic chapter on interpretation.'

In accordance with these recommendations, the Legislative Council of India enacted in 1881 the Code relating to the Negotiable Instruments, and in 1882, the Codes relating respectively to Trusts, Transfer of Property, and Easements. In the same year were also passed revised editions of the Codes relating to Companies, Civil Procedure, and Criminal Procedure.

FORM OF INDIAN CODES

The draftsmen of the Indian Codes have all worked practically on the same plan. Every Act is divided into sections and, where necessary, chapters and parts. Lengthy sections have been sub-divided into clauses and paragraphs. Each Act has a short title which indicates, in a general way, the subject of the law. The preamble to the Act expresses the purpose of the enactment. The preamble is followed by a statement of the local and, where necessary, the personal, application, and the time at which it is to come into force.[1]

USE OF ILLUSTRATIONS

A very characteristic feature, a salient peculiarity of the Indian Codes is the use of illustrations in the body of the Codes. The precursor of this system was Lord Macaulay who first made a copious use of illustrations in his Draft of the Indian Penal Code. 'These illustrations will, we trust, greatly facilitate the understanding of the law, and will at the same time often serve as a defence of the law'. 'Our illustrations, we trust, will in a similar manner facilitate the study of law'. These were the ideas with which the First Law Commission under the guidance of Macaulay made use of illustrations in their Drafts.

The illustrations do not make law by themselves. They only exhibit the law in full action, and show what its effect will be on the events of common life. They guide the Judges in their decisions and explain in what manner the definitions and rules to which they are annexed are to be interpreted and applied.

In the words of the First Law Commission, 'The Code will be at once a statute book and a collection of decided cases....'The illustrations therein are the instances of the practical application of the written law to the affairs of mankind. The use of illustrations in the Codes has been very useful for all—the judge, the lawyer and the litigant. They

1. Stokes, Anglo-Indian Codes, I, xxii.

have obviated many questions of construction and done much to fix the sense of law.

VALUE OF THE CODES

The chaotic state of the law in 1833 led up to the period of codification, which was ushered in by Macaulay's Commission, and which, after the lapse of many years bore fruit in the Anglo-Indian Codes. India then was singularly devoid of laws. Whatever laws existed were uncertain, conflicting, contradictory and vague. Courts, unaided as they were—there being neither law books, nor a definite system of law and the Judges themselves often being untrained in the law—found it almost difficult to administer justice in a sound manner. But when the questions of law came before them for decision, they had to be decided one way or the other. So the Judges began to make law. In a civilized and progressive country, law can never be stagnant. Legislation goes on constantly either consciously or unconsciously. Either the Legislature or the Courts legislate. Legislation by the Courts—its scope being more in the absence of the other legislation—suffers from a number of disadvantages. It is unscientific, incoherent, disuniform, uncertain and bulky. To avoid these defects, or rather to minimise them, the only feasible process is legislation by the Legislature. Supporting the case for continuing the process of codification in India, Sir Henry Sumner Maine in 1879 wrote: 'But legislation by Indian Judges has all the drawbacks of judicial legislation elsewhere, and a great many more. As in other countries, it is haphazard, inordinately dilatory, and inordinately expensive, the cost of it falling almost exclusively on the litigants. But in India judicial legislation is, besides, in the long run, legislation by foreigners, who are under the thraldom of precedents and analogies belonging to a foreign law, developed thousands of miles away, under a different climate and for a different civilization'. It was, therefore, necessary to undertake codification of the Indian Law on an extensive scale. It is fortunate that the process of codification started early in India and to a very great extent Indians were spared from the pangs of judge-made law.'

The Indian Codes have been a great *boon* to the country. They have conferred positive benefits on the people. Uncertainty of law leads to unnecessary litigation subjecting the people to great financial loss, injuring their property and wasting their time and energy. The Codes have made the law certain to a very great extent.

On topics on which the Codes exist the law, more or less, is uniform throughout the country. The Codes run uniformly throughout the length and breadth of the country. India thus has achieved a sort of unity in the legal sphere, the like of which was never achieved by it and has not yet been achieved by any other country in the world.

The law made by the Judge is necessarily scattered over a large volume of literature. It is not precise as it is evolved not from a general point of view but with a view to the facts in the particular case before the Court. The Codes of India have rendered the provisions of the law on the subject with which they deal into a comparatively *narrow compass*. They have made the law generally better known to the people. 'The Codes', in the words of Stephens, 'would include in a single volume of very moderate size a far larger amount of law thrown into the shape of specific propositions and arranged in a consecutive and systematic manner than English lawyers in general can possibly be acquainted with when they begin the practice of their profession.' He further goes on to observe in this respect: 'The best illustration of the advantages of this state of things is supplied by the Indian Penal Code. I do not hesitate to say, and I speak with much experience of the subject, that a young man of good capacity would get a far better and more scientific notion of criminal law in general, and of the Indian Criminal Law in particular, from a week's study of the Penal Code, than he could get from any amount of study of such books as Roscoe's Criminal Pleading, Archbold's Criminal Practice, or even Russell on Crimes. The Penal Code might be improved in several important particulars, both in substance and in form; but no one, who has not a professional acquaintance with the difficulties of the English criminal

law, can possibly measure the importance of the improvement which it has effected.'

He continued, 'The same, I am convinced, is true of the Indian Contract Law and the Codes of Civil and Criminal Procedure. The Succession Act is of less practical importance than these, as it applies only to Europeans; but no one can judge of its merits who is not acquainted with the corresponding parts of the law of England, their unspeakable prolixity and intricacy and utter want of any sort of system, except that which it has been worth the while of occasional text-writers to bestow upon them'.[1]

The Codes have generally made the law cognoscible to the people. They are by no means faultless. In the words of Ilbert their workmanship, judged by European standards, is often rough. On various points they are capable of *improvement*. Nevertheless, their value for India has been great. Mr. Pollock praises them by saying that the Indian Codes 'are the best models yet produced.' India is fortunate in having the priceless boon of a body of substantive law—clear, compact and easily ascertainable. They have been of great practical utility to all—the Judges, Courts, Government and the people.

The whole of the sphere of substantive law has not yet been covered by codification. Many important branches are still uncodified like the Law of Torts, the Hindu Law and the Mohammedan Law. Judging from the experience of the Codes already in existence, it may be safely said that there is necessity, and also expediency, of extending the process of codification to the remaining branches of law.

In a Dispatch to the Secretary of State, dated 10th March 1877, the Government of India succinctly narrated the reasons for continuing the process of codification in India.

'We feel' runs the Dispatch 'that the reduction to a clear, compact and scientific form, of the different branches of our Substantive Law, which are still uncodified, would be a

1. Stephen, Minute on the administration of justice in British India.

work of the utmost utility, not only to the judges and legal profession, but also to the people and the Government. It would save labour and thus facilitate the despatch of business and cheapen the cost of litigation ; it would tend to keep our untrained judges from error ; it would settle disputed questions on which our superior courts are unable to agree ; it would preclude the introduction of technicalities and doctrines unsuited to this country ; it would perhaps enable us to make some urgently needed reforms without the risk of exciting popular opposition and it would assuredly diffuse among the people of India a more accurate knowledge of their rights and duties than they will ever attain if their law is left in its present state, that is to say, partially codified, but the bulk ascertainable only from English text books written solely with reference to the system of English Law, and from a crowd of decisions, often obscure and sometimes contradictory, to be found in the English and Indian law-reports'.

C

THE PERSONAL LAWS OF HINDUS AND MOHAMMEDANS*

BOOKS PREPARED IN ENGLISH

Out of all the provisions made by Warren Hastings for the administration of justice in Bengal, the most enduring, the most significant was that which prescribed the Hindu Law to Hindus and the Muslim Law to Muslims, in certain heads of civil litigation. To a very great extent this scheme holds the field even to-day after a period of one hundred and eighty years. To-day the Hindu Law governs the Hindus in topics of Marriage, Adoption, Joint Family, Debts, Partition, Inheritence and Succession, Stridhana, Women's property, Maintenance, Religious Endowments etc.

Throughout his tenure of office, Hastings adhered very tenaciously to the principle of applying their own personal laws to the Hindus and the Mohammedans. He was convinced

that it would be a major failure to impose a Code borrowed from some outside legal system.

The English Judges who were called upon to administer these oriental systems of Laws, without any knowledge either of the laws or the language in which they were couched, would have found it impossible to work the system had it not been for the fact that they were provided with the assistance of the Native Law Officers—Kazis and Pandits—who were to expound the principles of these Laws to them.

A wrong notion appears to have gone abroad that the Hindus and the Mohammedans did not have any *definite* system of law, and that, whatever Laws they had, were all superstitions and nothing else. To remove this misapprehension, and also to make it possible for the English Judges in India to have some knowledge of these two great legal systems so as to better enable them to discharge their judicial functions, Hastings projected a Code of Hindu Law in the English language. Such a step was very necessary for the sake of giving confidence to the people, and of enabling the Courts to decide with certainty and despatch cases coming before them. For this purpose, ten learned Pandits were invited to Calcutta from all parts of the Province of Bengal and Bihar. The most authentic books on the Hindu Law were collected and a Code of Hindu Law *perpared* in the Sanskrit language. This was then translated into the Persian language and from this an English version was prepared by Nathaniel Brassey Halheid. From 1773 to 1775 the Pandits took two years to finish their labours. The book came to be called as the Halheid's 'Code of Gentoo Laws'.

The same motives which dictated the prepartion of a Code of Hindu Laws, also induced Warren Hastings to recommend the preparation of a translation of the *Hidaya* into English. The Arabic version of this book of the Mohammedan Law was rendered into Persian, from which Mr. Hamilton prepared an English translation.

The two Codes were prepared under the *direct patronage*

of Warren Hastings and they represented the earliest attempts on the part of the English to ascertain the principles of the personal laws of the Hindus and the Muslims.

The project of preparing books on these Laws in the English language was carried further in subsequent years. Immediately after Hastings, Sir William Jones, a Judge of the Calcutta Supreme Court, undertook the preparation of books on the Hindu Law under the patronage of Lord Cornwallis. The importance of such a project had been enhanced by the Act of 1781 which prescribed the application of the Hindu and Mohammedan Laws in cases of succession, contract and dealing between party and party. Moreover, English Judges wished to master the principles of the Laws themselves so as to reduce their dependence on Indian Law Officers. A general distrust in the *integrity* and *honesty* of these Officers prevailed, and the ignorant English Judges felt sensitive and uneasy as they felt that they were completely in the hands of Pandits and Moulvies. The best way to avoid danger was to have the Hindu Law and the Mohammedan Law translated into English. Earlier attempts made under the patronage of Hastings were not very successful as the works produced thereby were not of a very high quality and were defective in many ways. Sir Jones was a great linguist and he had an intimate knowledge of thirteen and a fair knowledge of twenty eight languages. He proposed to the Governor General in Council in 1788 that he might be allowed with some financial assistance so that he might prepare the Codes. The Government agreed accordingly. In 1792, he published his translations of the Mohammedan Law of Succession to the property of the intestates, and the Mohammedan Law of Inheritance. He published his Institutes of the Hindu Law, or the Ordinances of Manu, early in 1794. In the meantime his Digest on the Hindu Law was in course of preparation. Jones could not see the completion of his efforts for he died early. The Digest of the Hindu Law, projected by him was prepared by Jagannath, which was later translated by Colebrooke.

These were the initial attempts of the English to ascertain and define the principles of the Hindu and Muslim Laws, which were by no means, clear or uniform. These attempts were continued by many who prepared books in English on these systems of Laws. These books played a very important role in removing many of the *misapprehensions* that previously were early entertained about the intrinsic worth and merits of these two systems.

NATIVE LAW OFFICERS

It would have been impossible to work Hastings' rule of 1772, prescribing the personal laws to Hindus and Muslims, merely with the help of the English Judges unaided and unassisted. They were not familiar with native languages, habits and customs. They had no idea of these Laws. They could not hope to secure any help from the books pertaining to these Laws. In the first place, these books were couched in languages—Sanskrit, or Persian or Arabic—which it was difficult for them to read or understand. In the second place, these books were not purely books of law but dealt with religious principles and precepts also. In the third place, the amount of literature was so vast—developed as it was at various places and at diffarent periods—that it presented a confusing picture of incoherent, undigested mass of literature.

The difficulties of the English Judge were very well appreciated by Hastings. To make the judicial system workable, he made available to these Judges the help and assistance of the Native Law Officers. This system of Pandits and Maulvies assisting the English Judge to come to a decision by expounding to him the principles of the indigenous law, applicable to the set of circumstances proved before the Judge, initiated by Hastings, continued to be in operation for a fairly long time and it was not confined to Bengal only but went to all those places where the Company's judicial system came into operation.

The Native Law Officers though they continued to assist the Judges for all this time, must have found themselves in an

unhappy position. The English Judge never trusted, never confided in the Native Law Officers—who were regarded as being open to corruption and bribery. The English Judge always had an under-current of hostility toward the Native Law Officers and he never kept a secret of this feeling. It was often expressed bluntly by highly placed persons. Jones, a very gifted Judge of the Supreme Court, a scholar and a linguist, expressed his feeling in these words.

'It would be absurd and unjust to pass an indiscriminate censure on so considerable a body of men, but my experience justifies me in declaring, that I could not with an easy conscience concur in a decision merely on the written opinion of native lawyers in any cause in which they could have the remotest interest in misleading the Court, nor, how soever vigilant we might be, would it be very difficult for them to mislead us, for a single obscure text, explained by themselves, might be quoted as express authority, though perhaps, in the very book from which it was selected, it might be differently explained, or introduced only for the purpose of being exploded.'

'Even if there was no suspicion of corruption on the part of the interpreters of the law, the science which they profess is in such a state of confusion that no reliance can be placed on their answers'.

Under such circumstances, it may be realised, only expediency or the extreme necessity could have sustained the Native Law Officers in their situations. The English Judges, however, were anxious to dispense with them as early as possible and to put an *end* to their dependence on the Native Law Officers.

The one *remedy* for this tangle was the preparation of complete Digests of the Hindu and Muslim Laws, with the help of experienced and learned Native Lawyers, translated into English. Ascertainment of the Law was the only corrective of this unhappy state of affairs. Consequently, the process of compiling such Digests started. Halheid's Code of Gentoo

Laws was the first fruit of this process. In course of time, many other good books on personal laws written by eminent English scholars came into existence.

Further, administration of Native Laws for nearly 100 years created a body of precedents making many principles of these systems more definite and certain. The English Judges felt themselves on firmer ground, and better able to administer the Native Laws independently of the Native Law Officers. In consequence, in 1864 the Government came to the conclusion that it was unnecessary to continue the offices of the Hindu and Muslim officers. Act No. XI of 1864 was passed to put an *end* to this *institution*.

SECTS AND SUB-SECTS

Hastings' rule reserving the 'Law of the Koran' to Muslims and the 'Law of the Shaster' to Hindus had been expressed in the Cornwallis' Code of 1793 thus: 'That in suits regarding succession, inheritance, marriage and caste, and all religious usages and institutions, Mohammadan Law with respect to Mohammadans, and Hindu Law with regard to Hindus, are to be considered as the general rules by which Judges are to form their decisions.'

As is well known, the Hindus and the Mohammedans are divided into various sects and sub-sects. The Mohammedans have two major divisions, *Shia* and *Sunni*. Hindus have become divided into various groups mainly on the basis of *religion*, and Sikhs, Jains, Budhists are some of the conspicuous examples of such communities. It was not very clear as to what was to be the position of these various sects so far as the application to them of their personal law was concerned. The above rule was not specific on such an important point. There were various questions involved in this state of affairs. A majority of Muslims belong to the Sunni class. Were then the Shias entitled to their own law or were to be governed by the Sunni School? Sikhism, in a way, has developed out of, or rather split off from, the Hindu system. But there are now many important differences of doctrines and practices between

the two. It was not clear whether the Sikhs came within the term 'Hindu' or not. The matter may be looked at from another point of view also. Section 17 of the Act of Settlement of 1781 had prescribed in a few topics, the Hindu Law to Hindus and the Muslim Law to Muslims. All others were governed by the English Law. Now, if Sikhs are not Hindus then they had no reservation of their law in their favour and would be governed by the English Law. In the same way, if Jains are regarded as having fallen out completely from the Hindu fold then there was no reservation for them so far as the Supreme Court was concerned. They would become subject to the English Law.

Such and other questions of a similar nature arose in course of time and they were resolved only by the Courts. The position of these sects and sub-sects *vis-a-vis* the law to be applied to them became crystallised only by a long course of decisions.

In Rajah Deedar Hossain v. Ranee Zuhoornussa, an appeal from the Sadar Diwani Adalat at Calcutta, the Privy Council decided that Shias were entitled to their *own* Shia Law. 'According to the true construction of this Regulation, in the absence of any judicial decisions or established practice limiting or controlling its meaning, the Mohammadan Law of succession applicable to each sect ought to prevail as to litigants of that sect. It is not said that one uniform law should be adopted in all cases affecting Mohammadans, but that the Mohammadan Law, whatever it is, shall be adopted. If each sect has its own rule according to the Mohammadan Law, that rule should be followed with respect to litigants of that sect. Such is the natural construction of this Regulation, and it accords with the just and equitable principle upon which it was founded, and gives effect to the usages of each religion, which it was evidently its object to preserve unchanged....'[1]

HINDU LAW AND THE LEGISLATURE

The ancient system of Hindu Law, as contained in the

1. (1841) 2 M. I. A. 477.

Smritis and the *Commentaries*, developed in the context of social environments, economic conditions and a civilization which were radically different from those of the present day. Some of the features of the Law, therefore, appeared to be out of harmony with the present social conditions. It thus became necessary to modify the Law in certain respects so as to adapt it to meet the modern circumstances, exigencies and expediencies. With this in view, the Indian Legislature passed a mass of corrective and ameliorative legislation during the last hundred years.

The first and the foremost place is occupied by that body of enactments which seek to improve the social status of Hindu women. The prejudices of some of the Dharmashastra writers along with degenerate customs that arose in the Hindu society in course of time due to foreign domination, were responsible for making the social position of the Hindu women very deplorable. They came to occupy a very low position in the eyes of the Law. The Legislature, therefore, passed, from time to time, a number of Acts designed to improve their lot. The Hindu Widows' Remarriage Act, passed in 1856, was the first important measure in this series. The Act legalised remarriage of a Hindu widow. It is an enabling Act which was passed at the instance of a reforming section of the Hindus.

The Hindu Women's Rights to Propery Act, passed in 1937, is by far the most important piece of legislation which had effected revolutionary changes in the domain of Hindu Law of Joint Family, Coparcenery, Partition, Inheritance etc. The Act has conferred on the women better rights of property than they previously had.

The Hindu Married Women's Rights to Separate Residence and Maintenance Act, which came into operation in 1946 is the last measure of this series. This Act enables a Hindu married woman, without dissolving the marriage, to claim separate residence and maintenance from her husband under certain circumstances.

Certain Acts have been passed in order to suppress some

objectionable social practices which came to have the sanction of law and custom. A very conspicuous evil prevalent in the society was child marriage. The institution of child marriage was sapping the vitals of the Hindu society. To discourage this evil, the Child Marriage Restraint Act was passed in 1929.

The Hindu Legal system believed in a rigid caste system. Due to certain political and social influences working in India, the old water-tight compartments of the caste system broke down. People began to think in terms of a classless and casteless society. As a consequence, many of the old principles of the Hindu Law which sought to perpetuate class distinction, came to be removed. The Hindu Marriage Validity Act of 1949 is a great step forward in that direction. It validates Inter-caste Marriages. There was some confusion on the point earlier. Some High Courts had declared Inter caste Marriages to be void. The Act of 1949 removed all that confusion and doubt. The Act is a great step forward in the consolidation and integration of the Hindu Society and, there is no doubt, will help in the evolution of a classless, casteless society—which is the need of the time.

The British administrators always hesitated to modify the personal laws so as to bring them in conformity with the modern needs of the society. This attitude was born out of their desire not to interfere with religious susceptibilities of the Indians. The personal laws were too much identified with religion. Interference with the former might be regarded as an interference with the latter and so might be resented by the natives. The English being anxious to take the line of the least resistance, avoided all such complications.

This attitude was given expression to by the Second Law Commission in its second Report when it laid down that the Hindu and Mohammedan Laws ought not to be codified. Similar was the opinion of the Fourth Law Commission. A number of other illustrious Englishmen expressed a similar opinion. For example, Morley said, 'In considering the propriety of altering or abrogating the Hindu or Mohammedan

laws, all pre-conceived notions of the relative excellence of the English and native systems of jurisprudence should be taken as secondary considerations; nor should it be called in question whether such systems are in themselves good or bad; for it should never be forgotten, that, in the present state of society in India, they are undoubtedly the best adopted to the wants and prejudices of the people who form the great bulk of the population of the country; that they are an integral part of the faith of that people; and that, though we may not be bound by absolute treaty, we have virtually pledged ourselves to preserve them by repeated proclamations and enactments.'

In the same way, Sir C. P. Ilbert points out that one of the difficulties in the way of codification of the personal laws of Hindus and Mohammedans arises 'from the natural sensitiveness of Hindus and Mohammedans about legislative interference with matters closely touching their religious usages and observances'.

The apprehension of giving offence to the people of the country made the Indian Legislature during the British rule chary of modifying the personal laws. There have, therefore, been very few changes in these systems. And whatever changes have occurred have been made only when there was strong public opinion in their favour.

Times, however, have changed now. There are strong factors warranting codification of the personal laws. Take for example the Hindu Law; there are overwhelming reasons today for codifying the Hindu Law.

Several enactments affecting the Hindu Law have been passed by the Legislature from time to time. These laws have materially affected the orthodox system of the Hindu Law in many vital respects. The Hindu Women's Rights to Property Act, for example, has modified the Hindu Law to a very great extent. It is said, with a great deal of truth, that this Act has *struck at the roots of* the Hindu Joint Family System. Hitherto, all legislation in the sphere of the Hindu

Law has been *piecemeal, unplanned and unsystematic.* At the spur of the moment, or due to some exigencies, any one principle of the law was modified without reference to the rest. This uncoordinated piecemeal legislation, naturally and obviously enough, has created many unforeseen difficulties. The Hindu Law is an integrated whole mass. A change at one place has its unmistakable repercussions at various other places. The result of this piecemeal legislation has been to create *confusion, complexity* and *vagueness* in the Law. The only way to remove these difficulties is to take up the whole of Hindu Law and cast it in a mould which shall incorporate the changes already made but avoiding the sources of confusion.

Uniformity : The Law is, at present, divided into two main schools; and a number of sub-schools. There is a considerable measure of uniformity in the Hindu Law applicable to the different Provinces. But still, there are differences —some minor, while others major—in the various schools and sub-schools. The differences are not *intractable in character.* Many differences are unsubstantial. It will really be a great achievement *to unify* the Hindu Law and to produce a Code which uniformly applies throughout the country. On the points the schools and sub-schools of the law differ. The best thing will be to adopt that particular view which is liberal and suits best our modern and present needs.

Certainty and simplicity : It is needless to assert that codification of any branch of law brings forth certainty and simplicity. The great virtue of a Code is that it enunciates legal propositions in short and simple sentences. The Hindu Law, as it exists at the present day, suffers from the fact that its principles lie buried in a multitude of Reports of the various Courts. On many points the then highest Court—the Privy Council—has changed its opinions. Not only that, cases are not very infrequent when it is very difficult to ascertain general principles of law. All these difficulties will be solved by codifying the Hindu Law. By codification we can at once safely dispense with a vast amount of legal literature. Law

will become better known than it is to-day. Certainty of law will tend to avoid long and costly legislation.

Reforms : It is commonplace knowledge that the Hindu Law is a very old, ancient legal system. In the words of Mayne, 'The Hindu Law has the oldest pedigree of any known system of jurisprudence.' It is contained in a vast mass of literature which has been produced at differant times, at different places, and by different persons. A study of this literature reveals that the Hindu Law has never remained static ; that it has ever grown in the past. Unfortunately due to foreign domination, its growth and development were thwarted. The society was progressing by leaps and bounds. New ideas, new values of life, new modes of living continually affected the Hindu society and imparted it a new tinge and changed outlook. There has thus arisen a gap, a dichotomy, between law and society : and hence the need to modify the Hindu Law, so that it may satisfy the legitimate wants, aspirations and necessities of the modern society.

In the present context of things, law can develop only through *legislation*. The old agencies through which the Hindu Law developed in the past are not available now. Custom to be recognised legally must be ancient and so no modern custom can claim attention of the Court. The process of commenting—the powerful medicine through which the Hindu jurists like Jimutvahan and Vijnaneshwara shaped, moulded and adapted the Law—is simply not available to-day. The Courts will not accept the authority of any Hindu jurist, however, learned he may be. They are bound by the text of the dead jurists. Under these circumstances, if law has to develop—and develop it must—it is possible only through legislation. Hence the imminent necessity of codification.

THE MOHAMMEDAN LAW

As a matter of policy the Mohammedan Law was applied to Muslims in India just as the English applied to Hindus their personal law ; it continues to apply in such topics as

Inheritance, Succession, Gifts, Wakfs, Pre-emption Marriage, Divorce, Parentage, Guardianship and Maintenance.

The English tried to maintain the policy of non-interference perhaps much more tenaciously than they did in case of the Hindu Law. The changes made by the Legislature in the field of the Muslim Law during the last 150 years have been very few and far between. The first change that came in the Law was in 1913 when Legislature passed the Wakf Act. Before the passing of this Act the Privy Council decided in the famous case of Abdul Fata Mahomed Ishak Vs. Roosomoy Dhur Chowdhry that where the wakfs were founded for 'aggrandizement of family' or where the gifts or charity were illusory, or merely nominal wakfs were held to be void. This particular rule of law laid down by the Privy Council was not considered by the Muslims as being consistent with the true views of the Shariat. The Wakf Act of 1913 therefore was enacted with a view to bringing the law in confirmity with the Muslim Shariat Law. It restored to the Muslims of India the right to make valid wakfs in favour of a family.

There were a few communities like Khojas, Memons, Vohras who had become converts from Hinduism and embraced the Muslim religion. Even though converted they did not renounce the Hindu Law completely. In such fields as Inheritance and Succession the Hindu Law continued to administer these Muslim communities on the basis of its being their *customary law*. The year 1937 saw the passage of the Shariat Act which abrogated these customs and restored the personal law of the Muslims. The dissolution of Muslim Marriage Act was another piece of legislation enacted by the Indian Legislature in 1939. This act gave a Muslim wife the right of judicial separation from her husband which was denied to her earlier, perhaps, on account of the Courts following a Hanafi interpretation of the law.

These are the only few modifications that have been introduced in the Muslim Law over such a long period. It does not mean that this Law does not require many more modifications. The old system was developed in an age when

the society and environments were completely different from the modern Indian society. Some of the Muslim Institutions enforced by the Courts appear to be completely out of the *context* with the modern conditions of life ; as for example, polygamy, muta marriage and laws of divorce etc. Further there are many points on which there is great uncertainty of law. To mention only a few, reference can be made to the uncertainty prevailing in the spheres of Wills and Gifts even after the exposition of the law by the Privy Council in the famous case of Amjad Khan V. Ashraf Khan decided by the Judicial Committee in 1929 ; widow's right of retention over her dower property is also uncertain to some extent. For all these reasons, and for all those reasons on acccunt of which codification of the Hindu Law has been suggested, codification of the Muslim Law has become a *desideratum*. It is high time that codification of the Muslim Law should be undertaken along with codification of the Hindu Law.

Codification of the Hindu Law and the Muslim Law, it is hoped will be a momentous step foward in the direction of the realisation of the goal that the constitution of India has set forth vide Article 44 of the Directive Principles of the State Policy. The Article runs as follows :—'The State shall endeavour to secure for the citizens a *uniform civil code* throughout the territory of India.'

APPENDIX

IMPORTANT EVENTS

1600 : The East India Company was incorporated in England by a Charter of Queen Elizabeth.

1612 : An English Factory was established at Surat.

1639 : Madras was founded.

1661 : Charles II issued a Charter enhancing the judicial powers of the Governor and Council in the Company's settlements.

1666 : Madras became the Presidency.

1668 : Bombay was ceded to the Company by Charles II.

1683 : A Charter authorizing the Company to establish Admiralty Court was issued.

1687 : A Mayor's Court was started at Madras.

1726 : Mayors' Courts were started in the three presidency towns of Calcutta, Madras and Bombay.

1753 : A new Charter modifying the Charter of 1726 was issued to the Company.

1765 : Diwani of Bengal, Bihar and Orissa was granted to the Company by the Moghul Emperor.

1772 : Hastings', Judicial Plan or the Adalat system was introduced in Bengal.

1773 : The Regulating Act was passed.

1774 : The Supreme Court of Judicature was established at Fort William.

1781 : The Regulating Act was amended.

1793 : Cornwallis' Judicial Plan was introduced in Bengal.

1797 : Recorders' Courts were established at Bombay and Madras.

1800 : Madras came to have the Supreme Court of Judicature.

1823-1824 : Bombay came to have the Supreme Court of Judicature.

1828-1833 : William Bentinck reformed the Company's Judicature.

1833 : An Act modifying the constitution of the Privy Council was passed by the Parliament.

1833 : The Charter Act requiring appointment of a Law Commission was passed by the Parliament.

1834 : The First Law Commission was appointed.

1853 : The Charter Act was passed and the Second Law Commission appointed.

1856 : The Third Law Commission was appointed.

1861 : The Indian High Courts Act was passed.

1879 : The Fourth Law Commission was appointed.

1949 : The jurisdiction of the Privy Council was abolished.

1950 : India came to have the Supreme Court of Judicature.

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